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No. 98- ___

IN THE

Supreme Court of the United States

October Term, 1998

NATIONAL ASSOCIATION FOR BIOMEDICAL RESEARCH,

Petitioner,

v.

ANIMAL LEGAL DEFENSE FUND, INC., *et al*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether emotional distress felt by an individual on observing primates exhibited in a zoo constitutes judicially cognizable aesthetic injury-in-fact for purposes of establishing Article III standing?

(2) Whether an allegation that the plaintiff's emotional distress results from the government's failure to prohibit actions by private parties is sufficient to satisfy the causation and redressability elements of Article III standing?

PARTIES TO THE PROCEEDING

Petitioner is the National Association for Biomedical Research. Respondents are the Animal Legal Defense Fund, Roseann Circelli, Mary Eagan, and Marc Jurnove. The United States Department of Agriculture, the Secretary of Agriculture, and the Administrator of the Animal and Plant Health Inspection Service are also respondents.

RULE 29.6 LISTING

Petitioner is a nonprofit corporation qualified for tax exempt status under 26 U.S.C. § 501(c)(6). It has no parent companies and no nonwholly owned subsidiaries. Its members include nonprofit institutions and business corporations which operate biomedical research facilities regulated under the Animal Welfare Act.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

No. 98-___

NATIONAL ASSOCIATION FOR BIOMEDICAL RESEARCH,

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ANIMAL LEGAL DEFENSE FUND, INC. *et al.*,

Respondents.

Petition for a Writ of Certiorari
To the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

The National Association for Biomedical Research ("NABR") petitions this Court for a Writ of Certiorari to review the decision rendered by the United States Court of Appeals for the District of Columbia Circuit sitting *en banc*.

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals *en banc* are reported at 154 F.3d 426 (D.C. Cir. 1998) and are set forth in the Appendix ("App.") at App. 1a-49a. The original panel opinions are reported at 130 F.3d 464 (D.C. Cir. 1997) and are set forth in the Appendix at App. 84a-103a. The opinion of the United States District Court for the District of

Columbia is reported at 943 F. Supp. 44 (D.D.C. 1996) and is set forth in the Appendix at App. 50a-83a.

STATEMENT OF JURISDICTION

Plaintiffs in this case sought declaratory and injunctive relief pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* Subject matter jurisdiction was based on 28 U.S.C. § 1331. The court of appeals entered its judgment on September 1, 1998. On November 20, 1998, petitioner requested, pursuant to 28 U.S.C. § 2101(c) and Rule 30.2 of this Court, a 30-day extension of time in which to file the present petition. The Chief Justice granted that request on November 24, 1998, extending the time allowed for filing a petition for a Writ of Certiorari to and including December 30, 1998. This Court has jurisdiction to consider this petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The following statute and regulation, set forth in the Appendix, are involved in this case:

1. 7 U.S.C. § 2143(a)

2. 9 C.F.R. § 3.81

STATEMENT OF THE CASE

By a 7 to 4 vote, the District of Columbia Circuit sitting *en banc* held that respondent Marc Jurnove had established Article III standing on a claim of aesthetic injury derived from the emotional distress he claimed to have suffered upon seeing primates exhibited in zoo housing that he considered inhumane. Mr. Jurnove, with others, challenged a regulation the United States Department of Agriculture ("USDA") had promulgated to implement its statutory mandate to establish "minimum requirements . . . for a physical environment adequate to promote the psychological well-being of primates." *See* 7 U.S.C. § 2143(a). The case presents the important question whether a plaintiff's subjective psychological reactions to viewing animals or environmental conditions may give rise to constitutionally cognizable injury-in-fact. The issue is worthy of this Court's review at this time because the majority opinion below enlarges standing well beyond the metes and bounds established in this Court's prior decisions, conflicts at least in principle with decisions of other courts of appeals that have declined to find aesthetic injury on the basis of emotional distress alone, and was rendered in the circuit where most actions challenging federal regulations may be brought. Furthermore, by finding causation and redressability present even when the injury alleged is subjectively determined and ultimately unverifiable, the majority below would open the federal courts for resolution of disputes of taste and ideology rather than actual cases and controversies.

I. The Regulation at Issue

The regulation at issue in this case, 9 C.F.R. § 3.81, was promulgated pursuant to 1985 amendments to the Animal Welfare Act, 7 U.S.C. §§ 2131 *et seq.* (the "AWA" or the "Act"). The AWA directs the Secretary of Agriculture to "promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors" and provides that such standards "shall include minimum requirements" for, among other things, "a physical environment adequate to promote the psychological well-being of

primates." 7 U.S.C. § 2143(a). The regulation requires every regulated facility housing primates to

> develop, document, and follow an appropriate plan for environment enhancement adequate to promote the psychological well-being of nonhuman primates. The plan must be in accordance with the currently accepted professional standards as cited in appropriate professional journals or reference guides, and as directed by the attending veterinarian.

Section 3.81 specifies that each required plan "must include specific provisions to address the social needs of nonhuman primates of species known to exist in social groups in nature," in accordance with "currently accepted professional standards." 9 C.F.R. § 3.81(a). Exceptions to "social grouping" are permitted only in specific circumstances enumerated in the regulation.[1] In addition, "primary enclosures must be enriched by providing means of expressing noninjurious species-typical activities," such as perches, swings, mirrors, objects to manipulate, opportunities to forage or "other increased cage complexities." *Id.* § 3.81(b). Other detailed regulations, which respondents did not challenge, govern the sanitation, lighting, temperature, physical safety, health, feeding, and water supply of the primates. *See* 9 C.F.R. §§ 3.75-3.92.

II. Respondent Jurnove's Claimed Injury

Respondent Jurnove, three other individual plaintiffs, and the Animal Legal Defense Fund ("ALDF") filed an action for declaratory and injunctive relief in the United States District Court

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[1] Exceptions are permitted only if the "primate exhibits vicious or overly aggressive behavior, or is debilitated as a result of age or other conditions (e.g., arthritis)," or is suspected of having a contagious disease. *Id.* §§ 3.81(a)(1), 3.81(a)(2). When such an exception exists, the primate's housing must still permit it to "see and hear nonhuman primates of [its] own or compatible species unless the attending veterinarian determines that [this] would endanger [its] health, safety, or well-being." *Id.* § 3.81(a)(3).

for the District of Columbia on March 5, 1996. The original defendants were the United States Department of Agriculture, the Secretary of Agriculture, and the Administrator of the Animal and Plant Health Inspection Service. The Amended Complaint allegeD that the USDA failed "to adopt specific, minimum standards to protect primates' psychological well-being" and "instead delegated this responsibility to regulated entities by requiring that regulated entities devise 'plans' for this purpose." 154 F.3d at 430, App. 5a.[2]

Respondent Jurnove premised his standing on his psychological reaction to the conditions of animals exhibited at the Long Island Game Farm, a private zoo facility in New York State. He first visited this zoo in May 1995 in his "capacity as an equine investigator." 154 F.3d at 439 n.9 (citing Jurnove Affidavit ¶ 7), App. 21a. While there, he became concerned about the conditions of numerous animals housed in the zoo. His affidavit states that those conditions constituted "'an assault on [his] senses that greatly impaired [his] ability to observe and enjoy'" the animals. 154 F.3d at 432 (quoting Jurnove Affidavit ¶ 17), App. 8a.

Mr. Jurnove returned to the Game Farm repeatedly over a six month period for the purpose of photographing what he had seen and otherwise documenting complaints he submitted to USDA inspectors. 154 F.3d at 429-30 (citing Jurnove Affidavit ¶¶ 18-30), App. 4a-5a. He returned again in April 1996, "believing that it would be an enjoyable trip because of all the improvements that would have been made as a result of USDA's September, 1995 inspection, which [he] had been responsible for. To [his] dismay and sadness, [he] saw the animals in literally the same

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[2] The ALDF also alleged that the USDA violated the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. § 553, by failing to provide adequate opportunity for comment on its decision to allow regulated entities to keep their plans at their own facilities (rather than submitting them to the USDA). The original court of appeals panel held that ALDF lacked standing to press this claim, 130 F.3d at 470-71, App. 91a-93a, and the court did not include the issue in its *en banc* proceeding.

conditions as [he] had seen them over the summer of 1995." Jurnove Affidavit ¶ 33; *see also* 154 F.3d at 430, App.5a.

Many of the conditions recounted in Mr. Jurnove's affidavit involved animals other than primates and constituted the basis for the portion of the Amended Complaint that sought judicial intervention in USDA's enforcement activities under the Animal Welfare Act – a claim for relief that the district court rejected and that is no longer in the case. *See* 943 F. Supp. at 62-64, App.78a-81a. The conditions that provided the basis for the decision below that Mr. Jurnove has standing to challenge the legality of 9 C.F.R. § 3.81 were these:

- He observed two primates housed individually, one "a Japanese Snow Macaque [housed] in a cage 'that was a distance from and not in view of the other primate cages,'" the other "'a large male chimpanzee named Barney in a holding area by himself [and apparently unable to] see or hear any other primate.'" 154 F.3d at 429 (quoting Jurnove Affidavit ¶¶ 14, 8), App. 3a.

- He observed two squirrel monkeys which, although housed together, were kept in a shelter adjacent to a pen containing two bears, which, Mr. Jurnove believed, caused the squirrel monkeys to "act . . . very upset." *Id.* at 429, 439 (citing Jurnove Affidavit ¶ 11), App. 4a, 21a.

- He observed that "'[t]he only cage enrichment device [the Japanese Snow Macaque] had was an unused swing.'" *Id.* at 439 (quoting Jurnove Affidavit ¶ 14), App. 21a.

In his affidavit, Mr. Jurnove asserts that the conditions he observed violated the Secretary's regulations. *See* App. 42a (quoting Jurnove Affidavit ¶¶ 19, 21, 41). In the Amended Complaint, in contrast, the plaintiffs alleged that "the conditions that caused Mr. Jurnove aesthetic injury complied with current USDA regulations, but . . . lawful regulations would have prohibited those conditions and protected Mr. Jurnove from the injuries that he describes in his affidavit." 154 F.3d at 430, App. 5a.

III. The Proceedings Below

The district court granted the plaintiffs' motion for summary judgment, holding that three individual plaintiffs had standing,[3] invalidating the challenged regulation, 9 C.F.R. § 3.81, and ordering the USDA to promulgate a new regulation. 943 F. Supp. at 53-57, App. 61a-70a.

Petitioner National Association for Biomedical Research ("NABR"), a nonprofit trade association whose members include approximately 350 nonprofit institutions and business corporations engaged in biomedical research, thereafter intervened as a defendant in the district court. NABR and the federal government defendants appealed to the Court of Appeals for the District of Columbia Circuit.

A divided panel of the court of appeals reversed and remanded on December 9, 1997. The panel majority held, per Judge Sentelle, that the individual plaintiffs had not met their burden of demonstrating that their claimed injuries were "fairly traceable" to USDA's alleged failure to promulgate "minimum requirements" as mandated by the AWA, and that the "aesthetic" injuries claimed, even if they amounted to cognizable injuries-in-fact (which was "not apparent"), were "not likely to be redressed by the relief sought in this case." 130 F.3d at 468, App. 88a. Judge Wald dissented as to the standing of Mr. Jurnove, but did not address the merits of his claim. *Id.* at 471, App. 93a.

On March 10, 1998, the court of appeals granted rehearing *en banc*, limited to the question of Mr. Jurnove's standing. On September 1, 1998, the court of appeals held by a 7-4 majority that Mr. Jurnove had standing to sue. The majority, per Judge Wald, concluded that Mr. Jurnove had "alleged injury to an aesthetic interest in observing animals living under humane conditions" sufficient to establish a cognizable injury-in-fact, 154 F.3d at 438,

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[3] A fourth individual alleged only that the USDA had failed adequately to enforce its regulations, and, as noted, the district court rejected that claim. 943 F. Supp. at 62-64, App. 78a-81a.

App. 19a, that he had established both the causation and redressability requirements for constitutional standing, *id.* at 443, App. 21a, 29a, and that he also fell within the "zone of interests protected under the AWA's provisions on animal exhibitions." *Id.* at 444, App. 31a. The merits of the case were left for decision by a three judge panel of the court.[4] *Id.* at 445, App. 32a.

The dissent, per Judge Sentelle, disagreed "[b]ecause . . . the majority significantly weakens existing requirements of constitutional standing . . . ." 154 F.3d at 446, App. 32a. Arguing that the majority's recognition of the "purely subjective injury" claimed by Mr. Jurnove "radically departs from our precedent," the dissent wrote that only "concrete and particularized" injuries are sufficient to constitute cognizable injury-in-fact. In analyzing the causation element of constitutional standing, the dissent concluded that Mr. Jurnove's affidavit failed to meet the burden of proving that it is "substantially probable" that the challenged acts of the defendant – as opposed, for example, to the acts of an independent third party – caused his injury. *Id.* at 450, App. 40a. The dissenting judges also believed that Mr. Jurnove's affidavit failed to show that his asserted "aesthetic injury" – inherently subjective and a matter of "the plaintiff's own taste" – could be redressed "by a general court order directing the government to try again." *Id.* at 454, App. 47a.

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[4] The court of appeals has not yet established a schedule for further consideration of the merits, and we are mindful of the fact that there has been no final decision on the merits in the court below. The jurisdiction of the court of appeals was properly invoked, however, and this petition for a Writ of Certiorari is timely. The Court therefore has jurisdiction to take the case. *The Conqueror*, 166 U.S. 110 (1897). Moreover, there is ample precedent for the Court's granting of the writ despite the possibility of continued proceedings below. *See, e.g., Allen v. Wright*, 468 U.S. 737 (1984) (granting writ to consider standing question where court of appeals had reversed the district court's ruling that plaintiffs lacked standing); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982) (same); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (same); *see also United States v. General Motors Corporation*, 323 U.S. 373 (1945) (granting the writ after the court of appeals remanded a case for a new trial).

REASONS FOR GRANTING THE WRIT

The prior decisions of this Court recognize that aesthetic injuries can establish Article III standing, but also insist that "the psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 485 (1982). In this case, the court of appeals found aesthetic injury-in-fact *solely* on the basis of a plaintiff's report of his emotional response to conditions he deems unacceptable.[5] Because the court of appeals' decision expands the boundaries of Article III standing in the circuit in which most challenges to agency action may be brought, there is a compelling need for this Court to determine whether a plaintiff's claim of aesthetic injury can ever rest on a claimed emotional response to the failure of a regulated entity to comply with his view of what the regulation should require.

At its heart, the dispute below, and the injury-in-fact issue presented by this petition, is whether a plaintiff must point to an injury that can be verified by reference to objective criteria ***or*** whether a plaintiff may instead gain access to the federal judicial system by pointing to an injury that is measured solely by his description of his own subjective emotional responses. The majority opinion below falls squarely on the side of permitting such subjective responses to constitute the basis for Article III standing. Similarly, the court of appeals' willingness to consider subjective emotional distress as a cognizable consitutional injury distorts the causation and redressability elements of Article III standing. The decision below thus expands the realm of cognizable injuries well beyond this Court's decisions and the decisions of other courts of appeals, in a way that broadly enlarges the class of plaintiffs having standing to contest a wide selection of agency actions.

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[5] *Compare, e.g., Fund for Animals v. Lujan*, 962 F.2d 1391 (9th Cir. 1992) (allowing standing based on "fewer opportunities to view wild bison as a result of the defendant's actions" even though injury alleged consisted in part of emotional distress upon seeing bison shot).

I. The Decision of the Court Below Distorts This Court's Aesthetic Injury Jurisprudence by Recognizing Unverifiable Subjective Emotional Harm as the Basis for Article III Standing.

A. Palpable Injury-in-Fact is a Required Element of Article III Standing.

Under Article III, § 2, of the Constitution, the judicial power of the federal courts extends only to actual "cases" and "controversies." Whether a plaintiff has a sufficient stake in a matter to obtain judicial resolution of a dispute is the threshold question in testing for constitutional standing to sue. *Sierra Club v. Morton*, 405 U.S. 727 (1972). To demonstrate the existence of a "case or controversy" within the meaning of Article III, a plaintiff must have suffered "injury-in-fact" that is "fairly traceable" to the actions of the defendant and must show that the injury in question is likely to be redressed by a favorable decision. *E.g., Bennett v. Spear*, 117 S. Ct. 1154, 1161 (1997); *Northeastern Florida Contractors v. Jacksonville*, 508 U.S. 656, 663 (1993); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).[6]

To prove injury-in-fact, a plaintiff must identify a legally cognizable interest subject to a "particularized," "palpable," and "imminent" invasion. *Defenders of Wildlife*, 504 U.S. at 560; *Allen v. Wright*, 468 U.S. 737, 761 (1984); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983). The prior decisions of this Court have recognized the existence of an interest in observing "an animal species . . . for purely aesthetic purposes . . . ." *Defenders of Wildlife*, 504 U.S. at 562-63, *citing Sierra Club v. Morton*, 405 U.S. 727, 734 (1972); *see also Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 230 n.4 (1987). Accordingly, aesthetic harm can, on proper proof, give rise to the required

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[6] In addition to showing the three constitutionally-derived elements identified in the text, the plaintiff must satisfy a number of prudential standing requirements, including that his grievance arguably falls within the "zone of interests" protected or regulated by the provision of law invoked in his suit. *Bennett*, 117 S. Ct. at 1161.

injury-in-fact. *See United States v. Students Challenging Regulatory Agency Proceedings*, 412 U.S. 669, 686 (1973) ("*SCRAP*").

However, no prior decision of this Court or any court of appeals has found a cognizable aesthetic injury-in-fact in the absence of facts demonstrating a tangible threatened reduction in a plaintiff's opportunities to observe specific species of animals or specific environmental phenomena. For example, in *Japan Whaling*, the Court held that respondents had alleged sufficient injury-in-fact to their interest in watching and studying whales because of continued whale harvesting. *See* 478 U.S. at 230 n.4; *see also Didrickson v. Dept. of Interior*, 982 F.2d 1332 (9th Cir. 1992) (finding standing where sea otters were hunted); *Fund for Animals v. Lujan*, 962 F.2d 1391 (9th Cir. 1992) (finding standing where bison were shot); *Humane Society v. Hodel*, 840 F.2d 45 (D.C. Cir. 1988) (finding standing where migratory birds and game were hunted); *Animal Welfare Institute v. Kreps*, 561 F.2d 1002 (D.C. Cir. 1977) (finding standing where seals were killed), *cert. denied*, 434 U.S. 1013 (1978).

This Court has in addition firmly rejected the proposition that the "psychological consequence . . . produced by observation of conduct with which one disagrees" could ever constitute "an injury sufficient to confer standing." *Valley Forge*, 454 U.S. at 485. Recognizing as injury-in-fact the emotional "psychological consequences" of observing something with which one disagrees would inappropriately incorporate an element of radical subjectivity in federal jurisdictional analysis. A plaintiff could establish "injury-in-fact" so long as he *felt* injured by negative emotions such as the "sadness and dismay" of which Mr. Jurnove complains. Moreover, the rejection of "psychological consequences" as cognizable injury serves an important purpose linked to separation of powers; it prevents lawsuits brought by persons with a purely ideological stake in the outcome. *Cf. United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring).

There is, we submit, a substantial tension between the two Article III principles that "aesthetic injury" may, but

"psychological distress" may not, establish injury-in-fact. Every claim of aesthetic injury necessarily involves the plaintiff's psychological response to circumstances observed – but that response alone cannot rise to the level of constitutionally cognizable harm. *Valley Forge* necessarily requires more than subjective feelings to support a claim of aesthetic injury.

Until the decision below, the courts of appeals have uniformly recognized the requirement of *Valley Forge* that a plaintiff must describe more than his subjective feelings to show aesthetic injury-in-fact. The Fifth and Ninth Circuits have found standing in emotional distress cases only where the challenged government action changed the plaintiff's physical environment. In *Fund for Animals*, 962 F.2d at 1395-97, the Ninth Circuit held that emotional distress experienced by fund members on viewing the shooting of bison on property adjacent to theirs was a cognizable "psychological injury beyond a generalized concern for the bison's welfare" because the government action at issue had caused "a direct sensory impact of a change in [their] physical environment." The Fifth Circuit found an absence of injury in *Int'l Primate Protection League v. Administrators of the Tulane Educational Fund*, because the government "would produce no direct sensory impact on the plaintiff's own environment." 895 F.2d 1056, 1059 (5th Cir. 1990), *rev'd on other grounds*, 500 U.S. 72 (1991). The Fourth Circuit has suggested that a personal relationship between specific animals and the plaintiff, *predating* the controversy, might suffice to confer standing. *See International Primate Protection League v. Institute for Behavioral Research*, 799 F.2d 934 (4th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987).

Standing cases are rarely in direct conflict with one another in the sense of reaching opposing results on identical records; plaintiffs such as the respondents in this case repeatedly file suits that present varied fact patterns in the hopes of eventually identifying a plaintiff who demonstrates an injury sufficient to overcome the ban on generalized grievances and the rule, *see Sierra Club v. Morton*, 405 U.S. at 739, that a mere "interest in a matter" is insufficient to confer standing. This case is indeed the third occasion on which the ALDF has brought overlapping

groups of plaintiffs to federal court seeking standing to attack USDA animal welfare regulations with which it disagrees. *See Animal Legal Defense Fund v. Espy*, 29 F.3d 720 (D.C. Cir. 1994); *Animal Legal Defense Fund v. Espy*, 23 F.3d 496 (D.C. Cir. 1994). In these three cases alone, a total of eight individuals, one business corporation, and three advocacy organizations have sought to establish standing to sue, all of them unsuccessfully until the *en banc* decision below. The Court appears to have recognized this aspect of standing litigation, for numerous standing cases have been reviewed and decided on a Writ of Certiorari with no mention made of a conflict among the circuits.[7]

This case nonetheless presents a clear conflict in legal rule applied by the circuits. Each of the cases in the Fourth, Fifth, and Ninth Circuits discussed above stands in conflict with the decision of the District of Columbia Circuit, at least in principle, in view of differing interpretations given to *Valley Forge*. This case stands out as the first and only federal appellate decision to make a finding of injury-in-fact where emotional harm alone – "an assault" on Mr. Jurnove's "senses" and his feelings of "dismay and sadness" – provided the only indication of any injury whatsoever. In sharp and telling contrast with the cited decisions of other circuits, the majority decision below never even cites *Valley Forge*.

B. The Decision Below is Wrong.

Mr. Jurnove's injury rests entirely on his claim that he suffered "an assault on his senses" on his first visit to the Long Island Game Farm and felt "dismay and sadness" on his final visit eleven months later. He does not and could not claim that he lacks ready opportunities to observe primates housed in conditions of which he approves at locations other than the Long Island Game Farm. He does not even claim any special interest in observing or studying primates. He went to the Long Island Game Farm as a

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[7] *See, e.g., Bennett v. Spear*, 117 S. Ct. 1154 (1997); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990).

volunteer committed to animal welfare, *first* because he had been told equines were mistreated there, *then* to document the conditions he had observed, and *finally* in search of the satisfaction he would have experienced if his complaints had resulted in the changes he wanted to achieve. Mr. Jurnove's claim of injury accordingly rests exclusively on his own assessment of his emotional response to the conditions he saw on his visits to the Long Island Game Farm. The dissenters below were plainly correct in their conclusion that the majority opinion "recognizes an aesthetic injury based solely on a plaintiff's subjective emotional response to something he sees." 154 F.3d at 449, App. 39a. The majority decision therefore stands in flat contradiction of this Court's doctrine that cognizable injury *cannot* result from the "psychological consequence" of observing "conduct with which one disagrees." *Valley Forge*, 454 U.S. at 485. For that reason alone the decision below is wrong and should be reversed.

II. The Decision of the Court Below Distorts the Causation and Redressability Elements of Article III Standing.

The redressability element of Article III standing requires that a plaintiff show that it is "likely" (as opposed to merely "speculative") that his injury will in fact be redressed by a favorable decision. *Defenders of Wildlife*, 504 U.S. at 561. The causation element provides that a plaintiff's injury must be "fairly trace[able] to the challenged action of the defendant." *Allen v. Wright*, 468 U.S. 737 (1984). When, as here, the plaintiff's alleged injury is entirely subjective, establishing these elements of Article III standing is inherently an exercise in speculation.

Due to the subjective nature of Mr. Jurnove's interest (only Mr. Jurnove knows what his precise tastes are) and the unverifiability of his injury (only Mr. Jurnove knows whether and to what extent he is emotionally distressed), respondents cannot show redressability. As the dissenting judges pointed out, there can be no assurance that a favorable judicial decision in this case will redress the asserted psychological injury. *See* 154 F.3d at 453-54, App. 46a-48a. Mr. Jurnove states, for example, that he was distressed by observing a primate with access to only a single

"unused" cage enrichment device. *See* 154 F.3d at 429 (citing Jurnove Affidavit ¶ 14), App. 3a. Would Mr. Jurnove's distress be alleviated by adding a second enrichment device? Would three devices be enough? What type of devices would be required? Would he measure the devices' efficacy by the amount of time a primate used them? Nothing in Mr. Jurnove's affidavit or elsewhere in the record provides guidance on these matters. Even if Mr. Jurnove felt that the number of enrichment devices was adequate, he might nevertheless suffer "sadness and dismay" if he did not perceive the particular devices as sufficiently engaging a primate's attention.

The same type of speculation inheres in Mr. Jurnove's other allegations of injury. Any type of "social grouping" requirement, and any set of exceptions to that requirement, might fail to save Mr. Jurnove from "sadness and dismay" or other psychological distress. Would Mr. Jurnove approve an exception for primates that are ill, or aged, or that live alone in nature? Is housing in pairs sufficient, or would larger groupings be required to relieve his distress? Here again, the record is silent. Similarly, any set of rules about separating primates from other "incompatible" animals might fail to relieve Mr. Jurnove's negative response. If Mr. Jurnove is the sole judge of whether a particular way of treating animals causes him distress, there is no basis for concluding that a judicial decision in his favor is "likely" to redress his injury.[8]

As the dissent below pointed out, similar considerations apply to the causation element of Article III standing. *First*, Mr. Jurnove's affidavit alleges that the conditions that distressed him violated the Secretary's existing regulations. *See* App. 42a. If that is so, the regulations are not the cause of Mr. Jurnove's psychological injury.[9] *See* App. 44a. *Second*, it stretches the

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[8] Indeed, Mr. Jurnove himself may not know whether a particular set of conditions will cause him psychological or emotional distress until he actually experiences those conditions.

[9] To the extent Jurnove's complaint is really about the USDA's failure to enforce Section 3.81, it fails as a matter of administrative law, since enforcement actions

concept of causation beyond all reasonable limits to hold that government "causes" all the actions of private parties that it fails to prevent.[10] *Third*, and closely related to the two points just made, the statute instructs the Secretary to set "minimum requirements" that are "adequate to promote the psychological well-being or primates." *See* 7 U.S.C. § 2143(a). To the extent that Mr. Jurnove's psychological distress is caused by conditions that meet or exceed "minimum requirements," his injury cannot have been caused by the Secretary's allegedly unlawful regulation. The subjective nature of Mr. Jurnove's injury makes it virtually impossible to determine whether his psychological distress was caused by the Secretary's failure to do what the statute requires, or by a failure to do *more* than the statute requires. The nature of the plaintiff's alleged injury pushes the standing theory of the court below into the realm of impermissible speculation.

III. The Court of Appeals' Standing Analysis Has Broad Potential Consequences for Scientific Research and in Other Contexts.

The decision below has broad potential impact on litigation affecting matters of substantial public interest. The route pursued by Mr. Jurnove can be replicated by any would-be plaintiff seeking to impose his view of animal welfare on the many entities regulated under the Animal Welfare Act. By finding conditions of which he disapproves in any public or private zoo, such a person will be able to initiate litigation affecting regulations broadly applicable to many medical research facilities as well as zoos. The impact on medical research is potentially severe

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are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2); *Heckler v. Chaney*, 470 U.S. 821, 827-35 (1985). The district court found that the USDA enforcement decision was not reviewable, *see* 934 F. Supp. at 62-64, and the ruling was not appealed.

[10] Standing is often absent when a plaintiff sues the government over a harm inflicted by a third party, particularly when existing laws *prohibit* the conduct that inflicted the harm. *See, e.g., Allen v. Wright*, 468 U.S. 737 (1984); *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973).

because of the uncertainty such litigation would impose on the regulatory rules under which research institutions must function.

More broadly, the decision below permits plaintiffs to claim constitutionally adequate aesthetic injury in numerous situations previously thought to be outside federal court jurisdiction. Allegations of emotional distress, inherently incapable of objective verification, can now be used to confer standing in the unusually broad category of regulatory cases that may be brought in the District of Columbia. The plaintiff will need to do no more than assert his view of what a regulator should require and then claim emotional distress upon observing conditions that do not conform to that view.

A would-be plaintiff's sense of "good taste" and "beauty" – the essential determinants of aesthetic pleasure[11] – might entail placement of animals in brightly colored cages or no cages at all; or the exclusion of automobiles from national parks; or the placement or exclusion of handrails on mountain trails; or even the use of ornamental rather than grey scaffolding around the Washington Monument during periods of restoration. The decision below could even extend standing to an individual who seeks removal of religious figures from murals on the walls of the Supreme Court, or to someone who objects to the size of patients' rooms in Veteran's Administration hospitals – all on the ground that observing these conditions "assaults" the plaintiff's "senses" and produces feelings of "dismay and sadness."

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[11] *See* American Heritage Dictionary of the English Language 28 (3d. ed. 1996).

CONCLUSION

For the reasons set forth above, this Court should grant the petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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December 30, 1998

Supreme Court, U.S.
FILED

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No. 98 - ___

IN THE

Supreme Court of the United States

October Term, 1998

NATIONAL ASSOCIATION FOR BIOMEDICAL RESEARCH,

Petitioners,

v.

ANIMAL LEGAL DEFENSE FUND, INC., *et al*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX

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APPENDIX A

ANIMAL LEGAL DEFENSE FUND, INC. *et al.*

Plaintiff-Appellees,

v.

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE, *et al.*, AND NATIONAL ASSOCIATION FOR BIOMEDICAL RESEARCH

Defendant-Appellants

97-5009, Consolidated with Nos. 97-5031, 97-5074

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September 1, 1998, Decided

OPINION:

WALD, Circuit Judge:

The 1985 amendments to the Animal Welfare Act ("AWA") direct the Secretary of Agriculture to "promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors." Pub. L. No. 99-198, § 1752, 99 Stat. 1354, 1645 (1985) (codified at 7 U.S.C. § 2143(a) (1994)). They further provide that such standards "shall include minimum requirements" for, *inter alia*, "a physical environment adequate to promote the psychological well-being of primates." *Id.* Pursuant to this authority, the United States Department of Agriculture ("USDA")

issued regulations for primate dealers, exhibitors, and research facilities that included a small number of mandatory requirements and also required the regulated parties to "develop, document, and follow an appropriate plan for environment enhancement adequate to promote the psychological well-being of nonhuman primates. The plan must be in accordance with the currently accepted professional standards as cited in appropriate professional journals or reference guides, and as directed by the attending veterinarian." 9 C.F.R. § 3.81 (1997). Although these plans must be made available to the USDA, the regulated parties are not obligated to make them available to members of the public. *See id.*

The individual plaintiffs, Roseann Circelli, Mary Eagan, and Marc Jurnove,[1] challenge these regulations on the ground that they violate the USDA's statutory mandate under the AWA and permit dealers, exhibitors, and research facilities to keep primates under inhumane conditions. The individual plaintiffs allege that they suffered aesthetic injury during their regular visits to animal exhibitions when they observed primates living under such conditions.[2] A divided panel of this court held that all of the plaintiffs lacked constitutional standing to pursue their claims. *See Animal Legal Defense Fund, Inc. v. Glickman*, 327 U.S. App. D.C. 235, 130 F.3d 464, 466 (D.C. Cir. 1997). This court subsequently vacated that judgment and granted rehearing *in banc*.

We hold that Mr. Jurnove, one of the individual plaintiffs, has standing to sue. Accordingly, we need not pass on the standing of the other individual plaintiffs. *See Mountain States Legal Found. v. Glickman*, 320 U.S. App. D.C. 87, 92 F.3d 1228, 1232 (D.C. Cir.

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[1] Audrey Rahn, a fourth individual plaintiff, also appeared before the district court in this case. However, Rahn's claim focused only on the USDA's allegedly inadequate enforcement of its existing regulations, an issue not before this court on appeal. *See Animal Legal Defense Fund, Inc. v. Glickman*, 943 F. Supp. 44, 51, 62-64 (D.D.C. 1996).

[2] The Animal Legal Defense Fund ("ALDF"), an animal welfare organization, alleges that the USDA violated the notice and comment provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553 (1994), by failing to provide adequate opportunity to comment on the agency's decision to require regulated entities to keep their plans at their own facilities, *see* 9 C.F.R. § 3.81(e)(3), thereby protecting these plans from disclosure under the Freedom of Information Act, 5 U.S.C. § 552 (1994). The panel opinion held that ALDF lacked standing to sue, and the *in banc* court limited itself to considering Marc Jurnove's standing.

1996) ("For each claim, if constitutional and prudential standing can be shown for at least one plaintiff, we need not consider the standing of the other plaintiffs to raise that claim."). We leave consideration of the merits of the individual plaintiff's case to a future panel of this court to be selected by the usual means.

I. BACKGROUND

A. *Marc Jurnove's Affidavit*

Mr. Jurnove's affidavit is an uncontested statement of the injuries that he has suffered to his aesthetic interest in observing animals living under humane conditions. *See Animal Legal Defense Fund, Inc. v. Glickman*, 943 F. Supp. 44, 49 (D.D.C. 1996) (granting summary judgment to plaintiffs on all legal claims except one that plaintiffs have not appealed; defendants did not allege any genuine disputes of material fact, but instead moved only to dismiss for lack of standing).

For his entire adult life, Mr. Jurnove has "been employed and/or worked as a volunteer for various human and animal relief and rescue organizations." Jurnove Affidavit ¶ 3. "By virtue of [his] training in wildlife rehabilitation and [his] experience in investigating complaints about the treatment of wildlife, [he is] very familiar with the needs of and proper treatment of wildlife." *Id.* ¶ 6. "Because of [his] familiarity with and love of exotic animals, as well as for recreational and educational purposes and because [he] appreciates these animals' beauty, [he] enjoys seeing them in various zoos and other parks near [his] home." *Id.* ¶ 7.

Between May 1995 and June 1996, when he filed his affidavit, Mr. Jurnove visited the Long Island Game Farm Park and Zoo ("Game Farm") at least nine times. Throughout this period, and since as far back as 1992, the USDA has not questioned the adequacy of this facility's plan for the psychological well-being of primates.

Mr. Jurnove's first visit to the Game Farm, in May 1995, lasted approximately six hours. *See id.* While there, Mr. Jurnove saw many animals living under inhumane conditions. For instance, the Game Farm housed one primate, a Japanese Snow Macaque, in a cage "that was a distance from and not in view of the other primate cages." *Id.* ¶ 14. "The only cage enrichment device this animal had was an unused swing." *Id.* Similarly, Mr. Jurnove "saw

a large male chimpanzee named Barney in a holding area by himself. He could not see or hear any other primate." *Id.* ¶ 8. Mr. Jurnove "knew that chimpanzees are very social animals and it upset [him] very much to see [Barney] in isolation from other primates." *Id.* The Game Farm also placed adult bears next to squirrel monkeys, although Jurnove saw evidence that the arrangement made the monkeys frightened and extremely agitated. *See id.* ¶ 11.

The day after this visit, Mr. Jurnove began to contact government agencies, including the USDA, in order to secure help for these animals. Based on Mr. Jurnove's complaint, the USDA inspected the Game Farm on May 3, 1995. According to Mr. Jurnove's uncontested affidavit, however, the agency's resulting inspection report "states that [the USDA inspectors] found the facility in compliance with all the standards." *Id* ¶ 18. Mr. Jurnove returned to the Game Farm on eight more occasions to observe these officially legal conditions.

On July 17, 18, and 19, 1995, he found "virtually the same conditions" that allegedly caused him aesthetic injury during his first visit to the Game Farm in May. *Id.* ¶ 20. For instance, Barney, the chimpanzee, and Samantha, the Japanese Snow Macaque, were still alone in their cages. *See id.* This time, Mr. Jurnove documented these conditions with photographs and sent them to the USDA. *Id.* ¶¶ 19-20. Nevertheless, the responding USDA inspectors found only a few violations at the Game Farm; they reported "nothing" about many of the conditions that concerned Mr. Jurnove and that he had told the agency about, such as "the fact that numerous primates were being housed alone" and the lack of adequate stimulation in their cages. *Id.* ¶ 21.

Mr. Jurnove devoted two trips in August and one in September to "videotaping the conditions that the inspection missed," and on each trip he found that the inhumane conditions persisted. *Id.* ¶¶ 22-28. At the end of September, the USDA sent three inspectors to the Game Farm in response to Mr. Jurnove's continued complaints and reportage; they found violations, however, only with regard to the facility's fencing. *See id.* ¶ 29.

Mr. Jurnove returned to the Game Farm once more on October 1, 1995. Indeed, he only stopped his frequent visits when he became ill and required major surgery. *See id.* ¶ 30. After his

health returned, Mr. Jurnove visited the Game Farm in April 1996, hoping to see improvements in the conditions that he had repeatedly brought to the USDA's attention. He was disappointed again; "the animals [were] in literally the same conditions as [he] had seen them over the summer of 1995." *Id.* ¶ 33. Mr. Jurnove's resulting complaints prompted the USDA to inspect the Game Farm in late May 1996. For the fourth time, the agency found the facility largely in compliance, with a few exceptions not relevant to the plaintiffs' main challenge in this case. *See id.* ¶ 42. In June 1996, Mr. Jurnove filed the affidavit that is the basis of his claim here. He concluded this affidavit by stating his intent to "return to the Farm in the next several weeks" and to "continue visiting the Farm to see the animals there." *Id.* ¶ 43.

B. *The Plaintiffs' Complaint*

The plaintiffs' complaint elaborates a two-part legal theory based on the factual allegations in the individual plaintiffs' affidavits. First, the plaintiffs allege that the AWA requires the USDA to adopt specific, minimum standards to protect primates' psychological well-being, and the agency has failed to do so. *See, e.g.*, First Amended Complaint ¶ 97 ("In issuing final Part 3 regulations, USDA violated its statutory obligation [under 7 U.S.C. § 2143(a)(2)(B)] to set standards 'for a physical environment adequate to promote the psychological well-being of primates,' and instead delegated this responsibility to regulated entities by requiring that regulated entities devise 'plans' for this purpose."); *Id.* ¶ 106 ("Instead of issuing the standards on this topic, USDA's regulation [at 9 C.F.R. § 3.81] simply states that the 'plans' must be in accordance with currently accepted professional standards."); *Id.* ¶ 107 ("By providing that animal exhibitors and other regulated entities shall develop their own 'plans' for a physical environment adequate to promote the psychological well-being of non-human primates, USDA has failed to satisfy the statutory requirement that it set the 'minimum' standards.").

Second, the plaintiffs contend that the conditions that caused Mr. Jurnove aesthetic injury complied with current USDA regulations, but that lawful regulations would have prohibited those conditions and protected Mr. Jurnove from the injuries that he describes in his affidavit. *See id.* ¶ 53 ("Marc Jurnove has been and continues to be injured by USDA's failure to issue and implement standards for a physical environment adequate to promote the

psychological wellbeing of primates because this harms the nonhuman primates he sees at the Long Island Game Farm and Zoo which in turn caused and causes him extreme aesthetic harm and emotional and physical distress."); *id.* ("Because USDA regulations permit the nonhuman primates in zoos, such as the Long Island Game Farm and Zoological Park to be housed in isolation, Marc Jurnove was exposed to and will be exposed in the future to behaviors exhibited by these animals which indicate the psychological debilitation caused by social deprivation. Observing these behaviors caused and will cause Marc Jurnove personal distress and aesthetic and emotional injury."); *id.* ¶ 58 ("Marc Jurnove experienced and continues to experience physical and mental distress when he realizes that he, by himself, is powerless to help the animals he witnesses suffering when such suffering derives from or is traceable to the improper implementation and enforcement of the Animal Welfare Act by USDA.").[3]

C. *Procedural History*

The United States District Court, Judge Charles R. Richey, held that the individual plaintiffs had standing to sue, finding in their favor on a motion for summary judgment. *See* 943 F. Supp. at 54-57.[4] On the merits, the district court held that 9 C.F.R. § 3.81 violates the Administrative Procedure Act ("APA") because it fails to set standards, including minimum requirements, as mandated by the AWA; that the USDA's failure to promulgate standards for a physical environment adequate to promote the psychological well-being of primates constitutes agency action unlawfully withheld and unreasonably delayed in violation of the APA; and that the USDA's failure to issue a regulation promoting

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[3] Although the crux of the plaintiffs' complaint alleges that the USDA failed to promulgate minimum standards as required by the AWA, the complaint also states that the USDA has inadequately enforced even its existing regulations, by allegedly failing to inspect facilities and by allegedly instructing its inspectors to avoid documenting violations. *See* First Amended Complaint ¶¶ 122-23. As the district court found, *see* 943 F. Supp. at 62-64, the USDA's decisions about whether to undertake enforcement actions are generally unsuitable for judicial review, *see, e.g., Heckler v. Chaney*, 470 U.S. 821, 831, 84 L. Ed. 2d 714, 105 S. Ct. 1649 (1985). The plaintiffs have not appealed that judgment to this court.

[4] The district court also held that ALDF had standing to sue in its own capacity on its notice and comment claim, *see* 943 F. Supp. at 53-54, and found for ALDF on the merits, *see id.* at 61-62.

the social grouping of nonhuman primates is arbitrary, capricious, and an abuse of discretion in violation of the APA. *See id.* at 59-61.

A split panel of this court held that none of the plaintiffs had standing to sue and accordingly did not reach the merits of their complaint. *See* 130 F.3d at 466. This court granted rehearing *in banc*, limited to the question of Marc Jurnove's standing.

II. ANALYSIS

"The question of standing involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Bennett v. Spear*, 520 U.S. 154, 117 S. Ct. 1154, 1161, 137 L. Ed. 2d 281 (1997) (citation and quotation marks omitted). To meet the "case or controversy" requirement of Article III, a plaintiff must demonstrate: (1) that she has suffered "injury in fact;" (2) that the injury is "fairly traceable" to the defendant's actions; and (3) that a favorable judicial ruling will "likely" redress the plaintiff's injury. *Id.*; *see also Lujan v. Defenders of Wildlife*, 5 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992). In addition, the Supreme Court has recognized prudential requirements for standing, including "that a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Bennett*, 117 S. Ct. at 1161.

We find that Mr. Jurnove's allegations fall well within these requirements.

A. *Injury in Fact*

Mr. Jurnove's allegations solidly establish injury in fact. As his affidavit indicates, Mr. Jurnove "enjoys seeing [animals] in various zoos and other parks near [his] home" "because of [his] familiarity with and love of exotic animals, as well as for recreational and educational purposes and because [he] appreciates these animals' beauty." Jurnove Affidavit ¶ 7. He decided to tour the primate cages at the Game Farm "in furtherance of [his] appreciation for exotic animals and [his] desire to observe and enjoy them." *Id.* During this tour and the ones that followed, Mr. Jurnove suffered direct, concrete, and particularized injury to this aesthetic interest in observing animals living under humane conditions. At this particular zoo, which he has regularly visited and plans to keep visiting, he saw particular animals enduring inhumane treatment. He

developed an interest, moreover, in seeing these particular animals living under humane treatment. As he explained, "what I observed [at the Game Farm] was an assault on my senses and greatly impaired my ability to observe and enjoy *these captive animals*." *Id.* ¶ 17 (emphasis added). "I want to observe, study, and enjoy these animals in humane conditions." *Id.* ¶ 43.

Simply put, Mr. Jurnove has alleged far more than an abstract, and uncognizable, interest in seeing the law enforced. *See Allen v. Wright*, 468 U.S. 737, 754, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984) ("This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court."); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 223 n.13, 41 L. Ed. 2d 706, 94 S. Ct. 2925 (1974) (rejecting standing of plaintiffs who alleged nothing but "the abstract injury in nonobservance of the Constitution"); *Humane Society v. Hodel*, 268 U.S. App. D.C. 165, 840 F.2d 45, 51-52 (D.C. Cir. 1988). To the contrary, Mr. Jurnove has made clear that he has an aesthetic interest in seeing exotic animals living in a nurturing habitat, and that he has attempted to exercise this interest by repeatedly visiting a particular animal exhibition to observe particular animals there. This interest was allegedly injured, however, when Mr. Jurnove witnessed the actual living conditions of the primates described and named in his affidavit. It is, of course, quite possible that many other people might visit the same zoo, observe the same animals there, and suffer similar injuries upon seeing these animals living under inhumane conditions. But the fact that many may share an aesthetic interest does not make it less cognizable, less "distinct and palpable." *Allen*, 468 U.S. at 751 (citation and quotation marks omitted); *Clinton v. City of New York*, 141 L. Ed. 2d 393, 118 S. Ct. 2091, 2101-02 (1998) ("[It is a] self-evident proposition that more than one party may have standing to challenge a particular action or inaction. Once it is determined that a particular plaintiff is harmed by the defendant, and that the harm will likely be redressed by a favorable decision, that plaintiff has standing – regardless of whether there are others who would also have standing to sue."); *FEC v. Akins*, 1998 U.S. LEXIS 3567, 141 L. Ed. 2d 10, 118 S. Ct. 1777, 1786 (1998) ("Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found 'injury in fact.' "); *United States*

v. SCRAP, 412 U.S. 669, 688, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973) ("To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody."); *Sierra Club v. Morton*, 405 U.S. 727, 734, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972) ("Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.").

The Supreme Court has repeatedly made clear that injury to an aesthetic interest in the observation of animals is sufficient to satisfy the demands of Article III standing. *Defenders of Wildlife* states explicitly that "the desire to use *or observe* an animal species, *even for purely esthetic purposes*, is undeniably a cognizable interest for purpose of standing." 504 U.S. at 562-63 (emphasis added). Similarly, in *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 92 L. Ed. 2d 166, 106 S. Ct. 2860 (1986), the Court found that the plaintiffs had "undoubtedly . . . alleged a sufficient 'injury in fact' in that the whale watching and studying of their members will be adversely affected by continued whale harvesting," *Id.* at 231 n.4 (citing *Sierra Club v. Morton*, 405 U.S. 727, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972); *United States v. SCRAP*, 412 U.S. 669, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973)); *see also Animal Legal Defense Fund, Inc. v. Espy ("ALDF I")*, 306 U.S. App. D.C. 188, 23 F.3d 496, 505 (D.C. Cir. 1994) (Williams, J., concurring in part and dissenting in part) ("*Japan Whaling Association* and *Defenders of Wildlife* clearly recognize people's affirmative aesthetic interest in viewing animals enjoying their natural habitat.").

The key requirement, one that Mr. Jurnove clearly satisfies, is that the plaintiff have suffered his injury in a personal and individual way – for instance, by seeing with his own eyes the particular animals whose condition caused him aesthetic injury. As the Supreme Court noted in *Defenders of Wildlife*, "it is clear that the person who *observes* or works with a *particular* animal threatened by a federal decision is facing perceptible harm." 504 U.S. at 566 (emphasis added); *see also id.* at 582 & 584 n.2 (Stevens, J., concurring in the judgment) ("In my opinion a person

who has *visited* the critical habitat of an endangered species, has a professional interest in preserving the species and its habitat, and intends to revisit them in the future has standing to challenge agency action that threatens their destruction. . . . Respondents would not be injured by the challenged projects if they had not visited the sites or studied the threatened species and habitat.") (emphasis added); *Animal Legal Defense Fund, Inc. v. Espy ("ALDF II")*, 308 U.S. App. D.C. 74, 29 F.3d 720, 726 (D.C. Cir. 1994) (Mikva, C.J., concurring) ("Had the [plaintiffs] challenging the Secretary's regulations alleged an interest in protecting the well-being of *specific* laboratory animals (an interest predating this litigation), I think [the plaintiffs] would have had standing to challenge those regulations for providing insufficient protection to the animals.") (emphasis added); *Didrickson v. United States Dep't of the Interior*, 982 F.2d 1332, 1340-41 (9th Cir. 1992) (finding standing where plaintiffs "declared that they have observed, enjoyed and studied sea otters in specific areas in Alaska. . . . The [plaintiffs] are concerned with action harming sea otters in Alaska, where [they] live and in particular areas that they frequent, unlike the declarants in Defenders of Wildlife.") (emphasis added); *cf. Defenders of Wildlife*, 504 U.S. at 567 ("It goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection.").

This court's precedent, moreover, specifically recognizes that people have a cognizable interest in "viewing animals free from . . . 'inhumane treatment.' " *Humane Society v. Babbitt*, 310 U.S. App. D.C. 228, 46 F.3d 93, 99 n.7 (D.C. Cir. 1995) (quoting *Animal Welfare Institute v. Kreps*, 183 U.S. App. D.C. 109, 561 F.2d 1002, 1007 (D.C. Cir. 1977)); *see also ALDF I*, 23 F.3d at 505 (Williams, J., concurring in part and dissenting in part) ("Our own cases have indicated a recognition of people's interest in seeing animals free from inhumane treatment."). In *Animal Welfare Institute v. Kreps*, 183 U.S. App. D.C. 109, 561 F.2d 1002 (D.C. Cir. 1977), the plaintiff organizations alleged, *inter alia*, an interest in "enjoying Cape fur seals alive in their natural habitat under conditions in which the animals are not subject to . . . inhumane treatment," 561 F.2d at 1007 (citation and quotation marks omitted). This court held that these plaintiffs' aesthetic interests satisfied the requirements of

standing. *See id.* at 1007-10.[5] Similarly, Humane Society v. Hodel found standing based on a complaint "that the existence of hunting on wildlife refuges forces Society members to witness animal corpses and environmental degradation, in addition to depleting the supply of animals and birds that refuge visitors seek to view," 840 F.2d at 52. As this Court noted, "these are classic aesthetic interests, which have always enjoyed protection under standing analysis." *Id.*[6]

The Ninth Circuit has similarly recognized an aesthetic interest in observing animals living under humane conditions. In *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391 (9th Cir. 1992), the plaintiffs alleged aesthetic injuries stemming from the mistreatment of bison, who were subject to a population management plan that operated by shooting animals who strayed outside the boundaries of

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[5] The dissent attempts to limit *Animal Welfare Institute* to support standing only where the challenged governmental action is "diminishing the opportunity to observe [the animal], not affecting the quality of the observation." Dissent at 6. This statement does not accurately reflect either the injury alleged in *Animal Welfare Institute* or this court's holding in that case. In articulating the nature of their aesthetic injury, the *Animal Welfare Institute* plaintiffs alleged an interest in observing Cape fur seals who lived under "not . . . inhumane" conditions. 561 F.2d at 1007 – in other words, an interest in the *quality* of animal life, rather than the *quantity* of animals alive. To be sure, the "inhumane treatment" that concerned these particular plaintiffs revolved, as the dissent notes, around the manner in which the seals were being killed. *See id.* at 1012-13. But this fact does not reduce the plaintiffs' claim to one challenging the government only for causing the diminishment of an animal population. To the contrary, the plaintiffs in *Animal Welfare Institute* were alleging aesthetic injury based on *how* the Cape fur seals were living and *how* they were dying; the plaintiffs did not simply focus on the fact that the seals were, in fact, dying. Moreover, in holding that the plaintiffs' aesthetic interests would satisfy the requirements of standing if the plaintiffs could establish that they were among the injured, this court never distinguished between the plaintiffs' claims based on the quality of animal life and those based on the number of animals in existence.

[6] Not surprisingly, the dissent also reads *Humane Society v. Hodel* to support standing only where the challenged governmental action has or will deplete the supply of an animal population. *See* Dissent at 6. In fact, the case explicitly rejects that reading. The complaint in *Humane Society v. Hodel* stated *both* "that the existence of hunting on wildlife refuges forces Society members to witness animal corpses and environmental degradation" (a claim based on the *quality* of the aesthetic experience of observing animals) *and* that the challenged hunting regulations also "depleted the supply of animals and birds that refuge visitors seek to view" (a claim based on the *number* of animals in existence). 268 U.S. App. D.C. 165, 840 F.2d 45 at 52. This court, moreover, clearly recognized both of these claims, stating: "*These* are classic aesthetic *interests*, which have always enjoyed protection under standing analysis." *Id.* (emphasis added).

Yellowstone. In finding standing, the court observed "that the Fund's members had standing to sue because of the psychological injury they suffered from viewing the killing of the bison in Montana. Mr. Pacelle testified that several Fund members had been emotionally harmed when they saw bison 'who were just standing outside the boundary of the park shot and crumbled [sic] to their feet.' " *Id.* at 1396 (quoting testimony and citing *Humane Society v. Hodel*, 268 U.S. App. D.C. 165, 840 F.2d 45 (D.C. Cir. 1988)).[7]

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[7] It was suggested, not altogether facetiously, at oral argument that recognition of an aesthetic interest in observing animals might be problematic because it could encapsulate the aesthetic interest of a sadist in seeing animals living under inhumane conditions and the injury he suffered upon seeing particular animals living in a humane environment. There is a major difficulty with this argument. The meaning of "injury in fact" under our constitutional standing test does not incorporate every conceivable aesthetic interest. To the contrary, our standing jurisprudence defines injury in fact as "an invasion of a *legally protected interest*." *Defenders of Wildlife*, 504 U.S. at 560 (emphasis added). Thus, if the hypothetical sadist challenged the regulations at issue here (presumably, for being too protective of animal welfare), he would not be able to establish injury in fact because the AWA, the relevant statute, recognizes no interest in sadism. To the contrary, it requires dealers, exhibitors, and research facilities to treat animals *humanely*. *See* 7 U.S.C. § 2143. This sadist would also find his claim immediately excluded under the APA, which only grants standing to people "adversely affected or aggrieved by agency action *within the meaning of a relevant statute*." 5 U.S.C. § 702 (1994) (emphasis added); *see also Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 394, 93 L. Ed. 2d 757, 107 S. Ct. 750 (1987); *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153-54, 25 L. Ed. 2d 184, 90 S. Ct. 827 (1970); *ALDF II*, 29 F.3d at 723; *ALDF I*, 23 F.3d at 499.

The dissent attempts further to build on the suggestion put forth at oral argument that no one should be able to establish constitutional standing based on an aesthetic interest in observing animals living under humane conditions because definitions of what is "humane" may differ so widely. *See* Dissent at 6-7. But the dissent, again, forgets that not every aesthetic interest can form the basis for a lawsuit; our injury-in-fact test protects only those aesthetic interests that have been "legally protected." 504 U.S. at 560. At its heart, the dissent's complaint may reflect a fear that the AWA does not do enough to define what it means by "humane," although the statute does indicate, in its sections focusing on animal research, a particular concern with minimizing "animal pain and distress." *See, e.g.*, 7 U.S.C. § 2143(a)(3)(A). Yet "humane" does convey a basic meaning of compassion, sympathy, and consideration for animals' health, safety, and well-being, and it is not that unusual for this court to apply relatively broad statutory language to particular claims by looking to the normal usage of words, even when different people may disagree as to their application to a variety of factual situations.

Analogously, the Supreme Court and this circuit have frequently recognized the injury in fact of plaintiffs who suffered aesthetic injury stemming from the condition and quality, or despoliation, of an environmental area that they used. In Mountain States Legal Foundation, for instance, the plaintiffs asserted injury flowing from government action that would allegedly make the Kootenai National Forest more vulnerable to forest fire. This court found an "aesthetic and environmental interest[ ] in having such areas free of devastating forest fire . . . clearly sufficient for Article III standing." 92 F.3d at 1234. Similarly, in *Montgomery Environmental Coalition v. Costle*, 207 U.S. App. D.C. 233, 646 F.2d 568 (D.C. Cir. 1980), the plaintiffs challenged the Environmental Protection Agency's ("EPA's") regulation of "two sewage treatment plants that discharge pollutants into the Potomac River and its tributaries," 646 F.2d at 573. They "professed an interest in the preservation and enhancement of the natural environment situated along the Potomac estuary," 646 F.2d at 576, and alleged that the EPA had issued "permits too lax to protect the water quality of the Potomac," *id.* at 573. This court found standing. *See id.* at 578. *Committee for Auto Responsibility v. Solomon*, 195 U.S. App. D.C. 410, 603 F.2d 992 (D.C. Cir. 1979) (per curiam), involved "a challenge to the leasing by the General Services Administration (GSA) of the Great Plaza area of the Federal Triangle in Washington, D.C., for use as a parking facility for employees of federal agencies," 603 F.2d at 996. Plaintiffs, "two organizations whose purposes include improvement of the quality of the environment, together with three individuals who live and attend school in the District of Columbia," *id.* at 997, successfully established injury in fact based on allegations that they were "affected by noise, air pollution and congestion from vehicles utilizing the Great Plaza parking lot," *id.* at 998. In *Lujan v. National Wildlife Federation*, 497 U.S. 871, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990), the plaintiffs challenged federal action that allegedly "threatened the aesthetic beauty and wildlife habitat potential" of the South Pass-Green Mountain area of Wyoming, *id.* at 886 (citation and quotation marks omitted). The Supreme Court stated that it had "no doubt" that this threat could constitute aesthetic injury under Article III, noting that "the only issue" was whether the individual plaintiffs in the case had established that their interests "were actually affected." *Id.*; *see also id.* at 901 n.2 (Blackmun, J., dissenting) (arguing that plaintiffs had established

their standing and observing that "[a Bureau of Land Management] Mineral Report issued June 17, 1982, concluded that mining and associated activities 'could have an adverse impact on crucial moose habitat, deer habitat, some elk habitat, and a variety of small game and bird species. Improvements at campgrounds, as well as land in the immediate vicinity, could either be damaged or destroyed.' ") (citation omitted).

Indeed, *Humane Society v. Hodel*, which recognized an aesthetic interest in seeing animals living under humane conditions, explicitly acknowledged the usefulness of analogizing such an aesthetic interest to a plaintiff's interest in the condition of an environmental area that he uses. That case drew on our opinion in *National Wildlife Federation v. Hodel*, 268 U.S. App. D.C. 15, 839 F.2d 694 (D.C. Cir. 1988), which held that a wildlife organization had standing to challenge regulations that allegedly threatened to degrade the environment, *see* 839 F.2d at 703-16. The *Humane Society* court noted that the two cases involved "strikingly analogous" injuries, explaining: "There the National Wildlife Federation's standing rested in part on the aesthetic injuries to those members who complained of viewing degraded landscapes, and here the Humane Society's standing similarly rests on the aesthetic injuries to members who complain of viewing the despoliation of animals." 840 F.2d at 52 (citations omitted).

In the environmental context, too, however, plaintiffs must establish that they have actually used or plan to use the allegedly degraded environmental area in question. It is this failure to show such direct use that has resulted in the denial of standing in several high-profile environmental cases. For instance, the injury alleged in *Sierra Club v. Morton* would have been "incurred entirely by reason of the change in the uses to which Mineral King [Valley] will be put, and the attendant change in the aesthetics and ecology of the area." 405 U.S. at 734. Specifically, the Sierra Club alleged that the challenged development of the Valley " 'would destroy or otherwise adversely affect the scenery, natural and historic objects and *wildlife* of the park and would impair the enjoyment of the park for future generations.' " *Id.* (emphasis added).[8] The Supreme Court

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[8] The Mineral King Valley "is designated as a national game refuge by special Act of Congress." 405 U.S. at 728. The Sierra Club alleged, *inter alia*, "that various

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"[did] not question that this type of harm may amount to an 'injury in fact' sufficient to lay the basis for standing under § 10 of the APA." *Id.* However, having found "a cognizable interest," the Court held that the Sierra Club had not established that its members were "among the injured." *Id.* at 734-35. As the Court explained, "the impact of the proposed changes in the environment of Mineral King will not fall indiscriminately upon every citizen. The alleged injury will be felt directly only by those who use Mineral King and Sequoia National Park, and for whom the aesthetic and recreational values of the area will be lessened by the highway and ski resort." *Id.* at 735 (emphasis added). "The Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development. Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents." *Id.*

Similarly, the plaintiffs in *Lujan v. National Wildlife Federation* lacked standing because their affidavits "stated only that one of [the Federation's] members used unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action," rather than making clear that a plaintiff used the smaller area of land that was allegedly threatened. 497 U.S. at 889. In contrast, a plaintiff in *Mountain States Legal Foundation*, who established injury in fact based on aesthetic injury, stated "that he used the forest [in question] for, inter alia, hiking, hunting, camping, fishing, observing wildlife, finding solitude, and picking berries." 92 F.3d at 1234 (citations omitted). The plaintiffs in *Committee for Auto Responsibility*, who also successfully established their injury in fact, "claimed that they or their members live in or near the District of Columbia and regularly travel to educational, cultural and recreational facilities within the immediate vicinity of the Great Plaza [parking lot]." 603 F.2d at 998; *see also Montgomery Environmental Coalition*, 646 F.2d at 578 ("[The Coalition's] members include residents of Maryland, Virginia, and the District of Columbia, by whose shores the Potomac River flows.

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aspects of the proposed development contravene federal laws and regulations governing the preservation of . . . game refuges." *Id.* at 730.

We may take judicial notice of the fact that that river can be seen and smelt from those shores, and even that, as an important source of drinking water, it can be tasted . . . . Petitioners' members are users of the Potomac River, and their standing to challenge the Blue Plains and Seneca permits is clear.").

Other circuits have also recognized injury in fact based on injury to a plaintiff's interest in the quality and condition of an environmental area that he used. In *Public Interest Research Group v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64 (3d Cir. 1990), the Research Group's members "resided in the vicinity of or owned property on or near the Kill Van Kull, or recreated on or near the Kill Van Kull," *id.* at 71. They successfully "claimed injury to their aesthetic and recreational interests because the Kill Van Kull [was] polluted." *Id.* One member alleged that he "was particularly offended by the brown color and bad odor of the water. He stated that he would birdwatch more frequently and enjoy his recreation on the Kill Van Kull more if the water were cleaner." *Id.* In *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109 (4th Cir. 1988), the "Sierra Club submitted the affidavit of member John Railey attesting to his interest, as one regularly using and enjoying the Patapsco River and surrounding land, in preserving the environmental integrity of the river," *id.* at 1112. Mr. Railey established Article III injury based on an affidavit alleging that:

> "'My interest, use or enjoyment of the Patapsco River and surrounding area includes preserving the health, safety and welfare of the river basin, preserving marine life and water integrity within the river, and eliminating odorous and unsightly illegal pollution. I regularly hike along the river. My activities and interests with respect to the Patapsco River have been adversely affected physically, aesthetically and emotionally by Simkin's [sic] Industries' failure to comply with its NPDES permit and resulting illegal pollution.'"

Id. at 1112 n.3 & 1113 (citation omitted). *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57 (2d Cir. 1985), recognized injury in fact based on the pollution of "Conrail's A.E. Perlman Yard in Selkirk, New York (Selkirk Yard), a diesel locomotive repair and refueling facility, which discharges treated wastes from its operations through point sources into the Hudson River and

South Albany Creek," *id.* at 59, where the individual plaintiffs used the Hudson River and lived near its shores, *see id.* at 61; *see also Save Our Community v. U.S. Environmental Protection Agency*, 971 F.2d 1155, 1157, 1161 (5th Cir. 1992) (per curiam) (finding injury in fact where plaintiff alleged aesthetic injury stemming from "the draining of several ponds on the site of a proposed expansion of a 73-acre landfill"); *United States v. Metropolitan St. Louis Sewer District*, 883 F.2d 54, 56 (8th Cir. 1989) ("Missouri Coalition and two of its named members allege that many of the 25,000 members visit, cross, and frequently observe the bodies of water identified in the United States' complaint and that from time to time these members use these waters for recreational purposes. They also allege that these interests are adversely affected by the pollution of these waters. These allegations are sufficient to give the Coalition and its members constitutional standing. . . ."); *Chesapeake Bay Found. v. American Recovery Co.*, 769 F.2d 207, 209 (4th Cir. 1985) (per curiam) ("Plaintiffs here . . . allege that their members resided in the vicinity of the affected waters and that those members 'recreate in, on or near, or otherwise use and enjoy' those waters.").

These myriad cases recognizing individual plaintiffs' injury in fact based on affronts to their aesthetic interests in observing animals living in humane habitats, or in using pristine environmental areas that have not been despoiled, articulate a second principle of standing. It has never been the law, and is not so today, that injury in fact requires the elimination (or threatened elimination) of either the animal species or environmental feature in question. In *Sierra Club v. Morton*, the Sierra Club did not allege that the Mineral King Valley would disappear in the wake of the challenged development, or that the desecration of the Valley would leave the Club's members with no other, pristine parks that they could conveniently use. *See* 405 U.S. at 734. Yet the Supreme Court held that plaintiffs could establish injury in fact based on a decline in the quality and condition of one environmental area that they did use. *See id.*

To be sure, a number of cases that have recognized standing based on an aesthetic interest in the observation of animals have involved government action that allegedly threatened to dimnish the overall supply of an animal species. *See Defenders of Wildlife*, 504 U.S. at 562; *Japan Whaling Ass'n*, 478 U.S. at 231 n.4. But there is no case that we know of establishing that the

elimination of a species or even the deaths of particular animals is an indispensable element of the plaintiffs' aesthetic injury, and we see no reason to import such a requirement into our standing doctrine so late in the day. Indeed, the standing cases that do stress the threat of diminished animal populations were those brought under conservation statutes whose mission is to preserve the number of animals in existence. *See Defenders of Wildlife*, 504 U.S. at 558 ("[The Endangered Species Act] seeks to protect species of animals against threats to their continuing existence caused by man."); *Japan Whaling Ass'n*, 478 U.S. at 225 ("Because of the [International Whaling Commission's] inability to enforce its own quota and in an effort to promote enforcement of quotas set by other international fishery conservation programs, Congress passed the Pelly Amendment to the Fisherman's Protective Act of 1967. Principally intended to preserve and protect North American Atlantic salmon from depletion by Danish fisherman in violation of the ban imposed by the International Convention for the Northwest Atlantic Fisheries, the Amendment protected whales as well."). It is not surprising, then, that the plaintiffs who brought suit to allege violations of these statutes would emphasize that the challenged agency action threatened to diminish the supply of an animal species, in contravention of the express purpose of those conservation statutes. In contrast, the Animal Welfare Act, with which we deal here, is explicitly concerned with the quality of animal life, rather than the number of animals in existence. It seeks "to promote the psychological *well-being* of primates." Pub. L. No. 99-198, § 1752, 99 Stat. 1354, 1645 (1985) (codified at 7 U.S.C. § 2143(a) (1994)) (emphasis added). Quite naturally, suits alleging violations of this statute will focus on the conditions under which animals live. *Cf. ALDF II*, 29 F.3d at 722 ("The primary purpose of the [Federal Laboratory Animal Welfare] Act is to ensure the humane care and treatment of various animals used in research or for exhibition or kept as pets. 7 U.S.C. § 2131. To this end, the Act requires, inter alia, that the Secretary of Agriculture 'promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors.' *Id.* § 2143(a)(1)."). Along these lines, this court has already noted in *Animal Welfare Institute*, which recognized injury in fact based on an aesthetic interest in seeing animals living under humane conditions, that "where an act is expressly motivated by considerations of humaneness toward animals, who are uniquely

incapable of defending their own interests in court, it strikes us as eminently logical to allow groups specifically concerned with animal welfare to invoke the aid of the courts in enforcing the statute." 561 F.2d at 1007. Moreover, and perhaps more importantly, it does not make sense, as a matter of logic, to suppose that people suffer aesthetic injury from government action that threatens to wipe out an animal species altogether, and not from government action that leaves some animals in a persistent state of suffering. To the contrary, the latter seems capable of causing more serious aesthetic injury than the former.

Mr. Jurnove has adequately alleged injury to an aesthetic interest in observing animals living under humane conditions. His affidavit describes both the animal exhibition that he regularly visits, and the specific animals there whose condition caused Mr. Jurnove injury. It requires no expansion of existing standing doctrine to find that he has established a cognizable injury in fact.

B. *Causation*

Plaintiffs allege that the AWA, 7 U.S.C. § 2143, requires the USDA to adopt explicit minimum standards to govern the humane treatment of primates, and that the agency did not do so. *See* First Amended Complaint ¶¶ 97, 106, 107. They further contend that the conditions that caused Mr. Jurnove injury complied with current USDA regulations, but that lawful regulations would have prohibited those conditions and protected Mr. Jurnove from the injuries that his affidavit describes. *See id.* ¶¶ 53, 58. We find that these allegations satisfy the causation prong of Article III standing.

As Mr. Jurnove's affidavit elaborates, he allegedly suffered aesthetic injury upon observing conditions that the present USDA regulations permit. Mr. Jurnove, for instance, "saw a large male chimpanzee named Barney in a holding area by himself. He could not see or hear any other primate." Jurnove Affidavit ¶ 8. Mr. Jurnove also "viewed a monkey cage [containing one Japanese Snow Macaque] that was a distance from and not in view of the other primate cages." *Id.* ¶ 14. As the plaintiffs observe, see First Amended Complaint ¶¶ 84, 95, 114-17, the housing of these two primates appears to be compatible with current regulations, which state only that "the environment enhancement plan must include specific provisions to *address* the social needs of nonhuman

primates of species known to exist in social groups in nature. Such specific provisions must be in accordance with currently accepted professional standards, as cited in appropriate professional journals or reference guides, and as directed by the attending veterinarian." 9 C.F.R. § 3.81(a) (emphasis added). Thus, an exhibition may apparently comply with the procedural requirement that this standard creates – by establishing a plan that "addresses" the social needs of primates – and still leave a primate caged singly. Similarly, 9 C.F.R. § 3.81(a)(3) provides that "individually housed nonhuman primates must be able to see and hear nonhuman primates of their own or compatible species unless the attending veterinarian determines that it would endanger their health, safety, or well-being." Here again, the regulation is structured so that an exhibitor that secured the approval of the veterinarian in its employ could comply with the regulation without actually housing nonhuman primates within the sight or sound of other primates. Contrary to the dissent, *see* Dissent at 13-14, plaintiffs do not suggest that the regulation is flawed simply because it leaves room for bribery in securing a veterinarian's consent to an exception; rather, they contend that the regulation gives exhibitors too much leeway to shop around for a compliant veterinarian and that placing such broad and unguarded discretion in the hands of the veterinarian in an exhibitor's own employ is an insufficient safeguard to protect primate well-being. Whatever the ultimate merits of the plaintiffs' case, they most definitely assert that the AWA requires minimum standards to prohibit or more rigidly restrict the occasions on which such allegedly inhumane treatment can occur.

Mr. Jurnove's affidavit also states that "the pen next to the adult bears housed the squirrel monkeys. . . . I observed the monkeys repeatedly walking over to the door and sniffing and acting very upset when the bears came near." Jurnove Affidavit ¶ 11. Plaintiffs allege that the current regulations permit the housing of incompatible species next to each other. *See* First Amended Complaint ¶¶ 46-47. Specifically, these regulations state that "nonhuman primates may not be housed *with* other species of primates or animals unless they are compatible." 9 C.F.R. § 3.81(a)(3) (emphasis added). This provision does not expressly regulate animals housed next to each other, but in separate cages. But even if section 3.81(a)(3) does apply to the situation that Mr. Jurnove observed, it includes the caveat that "compatibility of nonhuman primates must be determined in accordance with

generally accepted professional practices and actual observations, as directed by the attending veterinarian," thus again permitting wide discretion on the part of the local veterinarian.

Similarly, Mr. Jurnove's affidavit observes that "the only cage enrichment device [a Japanese Snow Macaque] had was an unused swing." Jurnove Affidavit ¶ 14. The plaintiffs allege that such a situation is perfectly legal under the present regulations, see First Amended Complaint ¶ 84, which provide only that "the physical environment in the primary enclosures must be enriched by providing means of expressing noninjurious species-typical activities." 9 C.F.R. § 3.81(b). The regulations do not include any specific requirements governing the particular kind or number of enrichment devices. According to the plaintiffs, providing only a single swing, and one that the primate appears to shun, offends the AWA's mandate for minimum standards, although it is perfectly compatible with 9 C.F.R. § 3.81(b).[9]

The USDA's own actions in this case further support the plaintiffs' allegation that the agency's current regulations allow the conditions that allegedly caused Mr. Jurnove injury. As Mr. Jurnove's affidavit makes clear, the Game Farm has repeatedly submitted to inspection by the USDA. The allegedly inhumane conditions at the Game Farm have persisted precisely because the USDA inspectors have concluded on the basis of these visits that in every important aspect the conditions at the Game Farm comply with the USDA regulations. If the USDA had found the Game Farm out of compliance with current regulations, or if the governing regulations had themselves been more stringent, the Game Farm's owners would have been forced (in order to remain in accord with

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[9] The United States argues that Mr. Jurnove has not demonstrated causation, on the ground that the above-described injuries are self-inflicted. The assertion appears to turn on the fact that Mr. Jurnove first traveled to the Game Farm "in [his] capacity as an equine investigator, [after being] apprised that several ponies needed to be checked on at that location." Jurnove Affidavit ¶ 7. This argument may – or may not – have merit with regard to equine mistreatment at the Game Farm. However, there is no need in this case to offer any opinion about whether so-called "self-inflicted" wounds can give rise to standing. According to Mr. Jurnove's uncontested affidavit, he visited the primates at the Game Farm, the subject of the present suit, out of an aesthetic interest in observing animals living under humane conditions. *See id.* ("Once [Mr. Jurnove] was there [at the Game Farm]," he decided "to look around at the other animals housed there" "in furtherance of [his] appreciation for exotic animals and [his] desire to observe and enjoy them.").

the law) to either alter their practices or go out of business and transfer their animals to exhibitors willing to operate legally; either scenario would protect Mr. Jurnove's aesthetic interest in observing animals living under humane conditions. Instead, however, the USDA has not questioned the legality of the Game Farm's plan since 1992. Since May 1995, when Mr. Jurnove began visiting the Game Farm and complaining to the agency, the USDA inspectors have examined, and largely approved, the actual conditions at the facility at least four times. The USDA's first inspection report "states that [the USDA inspectors] found the facility in compliance with all the standards." Jurnove Affidavit ¶ 18. Although subsequent inspection reports identify a few conditions that Mr. Jurnove agrees violate the USDA regulations, the USDA continued – in at least three more inspection reports – to conclude that the Game Farm was in compliance with existing USDA regulations in all other respects, including presumably the existence of a plan that met the regulations' standards.[10]

Supreme Court precedent establishes that the causation requirement for constitutional standing is met when a plaintiff demonstrates that the challenged agency action authorizes the conduct that allegedly caused the plaintiff's injuries, if that conduct would allegedly be illegal otherwise. For instance, *Simon v. Eastern*

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[10] The dissent makes much of the fact that Mr. Jurnove occasionally expresses doubt in his affidavit about the soundness of the USDA's multiple determinations that the Game Farm was in compliance with essentially all of the relevant regulations, contending that "the thrust of the affidavit" is that "the USDA went through the motions and wrote up incorrect reports." Dissent at 12. This argument is flawed on two counts. First, Mr. Jurnove's affidavit is the wrong place to look for a statement of the plaintiffs' legal theory of this case. Mr. Jurnove is not a lawyer and his affidavit purports to articulate only his alleged injuries. The plaintiffs' legal arguments are put forth in their complaint, where they explicitly allege that the conditions at the Game Farm that caused Mr. Jurnove injury complied with the present USDA regulations. *See* First Amended Complaint ¶¶ 53, 58. Second, even if we were to look to Mr. Jurnove's affidavit to determine the plaintiffs' legal theory, the "thrust of the affidavit" is certainly not that the conditions at the Game Farm violated the USDA's regulations. Indeed, so far as the record before us reflects, no decisionmaking authority has ever made the determination that there are widespread regulatory violations at the Game Farm. And the USDA, the agency with regulatory control over the Game Farm, repeatedly came to the opposite conclusion, finding that the Game Farm was in legal compliance with the USDA regulations that the plaintiffs challenge here.

Kentucky Welfare Rights Organization, 426 U.S. 26, 48 L. Ed. 2d 450, 96 S. Ct. 1917 (1976), stated in describing earlier cases that:

> The complaint in [Association of] Data Processing [*Service Organizations, Inc. v. Camp*, 397 U.S. 150, 25 L. Ed. 2d 184, 90 S. Ct. 827 (1970),] alleged injury that was directly traceable to the action of the defendant federal official, for it complained of injurious competition that would have been illegal without that action. Accord, *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 27 L. Ed. 2d 179, 91 S. Ct. 158 (1970); *Investment Co. Institute v. Camp*, 401 U.S. 617, 620-621, 28 L. Ed. 2d 367, 91 S. Ct. 1091 (1971). Similarly, the complaint in *Data Processing's* companion case of *Barlow v. Collins*, 397 U.S. 159, 25 L. Ed. 2d 192, 90 S. Ct. 832 (1970), was sufficient because it alleged extortionate demands by plaintiffs' landlord made possible only by the challenged action of the defendant federal official. *See id.*, at 162-163.

Id. at 45 n.25. *Japan Whaling Association*, in turn, recognized the standing of plaintiffs who claimed aesthetic injury (there, injury to their interest in whale watching) based on the government's failure to adequately regulate a third party (there, the United States's failure to certify that the Japanese whaling industry was exceeding its quota under international law). *See* 478 U.S. at 231 n.4.

This circuit's case law confirms the proposition that a plaintiff satisfies the causation prong of constitutional standing by establishing that the challenged agency rule permitted the activity that allegedly injured her, when that activity would allegedly have been illegal otherwise. *Louisiana Energy and Power Authority ("LEPA") v. FERC*, 141 F.3d 364 (D.C. Cir. 1998), for instance, involved LEPA's challenge to a FERC decision that allowed one of LEPA's competitors to sell electric energy at unregulated rates, thus allegedly freeing this competitor "to use predatory pricing to lure away LEPA's customers," *id.* at 366. In holding that LEPA had standing to sue, this court first noted that "'petitioners sufficiently establish their constitutional standing by showing that the challenged action authorizes allegedly illegal transactions.' " *Id.* at 367 (quoting *Associated Gas Distributors v. FERC*, 283 U.S. App. D.C. 265, 899 F.2d 1250, 1259 (D.C. Cir. 1990)). It went on to

elaborate that "[a] party need not *prove* that the agency action it attacks is unlawful . . . in order to have standing to level that attack. As we said in *Claybrook v. Slater*, 324 U.S. App. D.C. 145, 111 F.3d 904, 907 (D.C. Cir. 1997), 'whether a plaintiff has a legally protected interest (and thus standing) does not depend on whether he can demonstrate that he will succeed on the merits.' " 141 F.3d at 368. Similarly, *Telephone and Data Systems, Inc. v. FCC*, 305 U.S. App. D.C. 195, 19 F.3d 42 (D.C. Cir. 1994), recently explained that "one narrow proposition at least is clear: injurious private conduct is fairly traceable to the administrative action contested in the suit if that action authorized the conduct or established its legality," 19 F.3d at 47. *International Ladies' Garment Workers' Union v. Donovan*, 232 U.S. App. D.C. 309, 722 F.2d 795 (D.C. Cir. 1983), also held that the appellants had established their standing to sue because "the relief sought by appellants would make the injurious conduct of third parties complained of in this case illegal; only by taking extraordinary measures – *i.e.*, violating the law or starting new businesses overseas – could third parties prevent redress of the appellants' injuries," 722 F.2d at 811; *see also National Wildlife Federation v. Hodel*, 839 F.2d at 705 ("Mere indirectness of causation is no barrier to standing, and thus, an injury worked on one party by another through a third party intermediary may suffice . . . . It is well settled that a plaintiff has standing to challenge conduct that indirectly results in injury. . . . We are concerned here not with the length of the chain of causation, but on [sic] the plausibility of each of the links that comprise the chain.") (citations and quotation marks omitted).

A question was raised at oral argument about whether Mr. Jurnove has nonetheless failed to satisfy the causation prong of constitutional standing, on the ground that the governing law simply permits the conditions that allegedly injured him, rather than requiring animal exhibitors to follow the allegedly inhumane practices. The background condition governing animal exhibitors, this argument proceeds, is that anything the exhibitors do is legal unless statutes and regulations make specific conduct illegal. Because neither the AWA nor the USDA's implementing regulations have changed this status quo – *i.e.*, in no way have they affected the conditions that allegedly injured Mr. Jurnove – there is no causal link between any government action and Mr. Jurnove's injury.

This argument, however, is founded on a false premise. The proper comparison for determining causation is not between what the agency did and the status quo before the agency acted. Rather, the proper comparison is between what the agency did and what the plaintiffs allege the agency should have done under the statute. The plaintiffs' legal theory of this case, which we accept for purposes of determining Mr. Jurnove's standing, is grounded on their view that animal exhibitors are in fact governed by a mandatory legal regime. Specifically, the plaintiffs allege that the AWA requires the USDA to establish specific, mandatory requirements that establish humane living conditions for animals. *See* 7 U.S.C. § 2143(a) (1994) (directing the Secretary of Agriculture to "promulgate *standards* to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors" and providing that these standards "shall include *minimum requirements*" for "a physical environment adequate to promote the psychological well-being of primates") (emphasis added). According to this view, the AWA itself prohibits the conditions that allegedly injured Mr. Jurnove, and the USDA regulations misinterpret the statute by permitting these conditions. *See* First Amended Complaint ¶¶ 53, 57, 97, 106, 107. Both the Supreme Court and this circuit have repeatedly found causation where a challenged government action *permitted* the third party conduct that allegedly caused a plaintiff injury, when that conduct would have otherwise been illegal. Neither court has ever stated that the challenged law must *compel* the third party to act in the allegedly injurious way. In *Investment Co. Institute v. Camp*, 401 U.S. 617, 28 L. Ed. 2d 367, 91 S. Ct. 1091 (1971), for instance, investment companies had standing to challenge a regulation from the Comptroller of the Currency that "*authorize[d]*," but did not require, "banks to establish and operate collective investment funds," *id.* at 618-19 (emphasis added). In *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 27 L. Ed. 2d 179, 91 S. Ct. 158 (1970) (per curiam), independent travel agents had standing to contest "a ruling by the Comptroller that, incidental to their banking services, national banks *may* provide travel services for their customers," *id.* at 45 (emphasis added). *Barlow v. Collins*, 397 U.S. 159, 25 L. Ed. 2d 192, 90 S. Ct. 832 (1970), involved plaintiffs who were allegedly "suffering irreparable injury under the [challenged] regulation because it provided their landlord '*with the opportunity* to demand that [they] and all those similarly situated assign the [upland cotton

program] benefits in advance as a condition to obtaining a lease to work the land,' " *id.* at 163 (emphasis added). In *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 25 L. Ed. 2d 184, 90 S. Ct. 827 (1970), data processing service organizations had standing to challenge a regulation providing that "national banks . . . *may* make data processing services available to other banks and to bank customers," *id.* at 151 (emphasis added).

In this circuit, *Bristol-Myers Squibb Co. v. Shalala*, 320 U.S. App. D.C. 32, 91 F.3d 1493 (D.C. Cir. 1996), explicitly rejected the distinction between permissive and mandatory government regulation. There, the plaintiff challenged the legality of Food and Drug Administration ("FDA") regulations governing the approval of new generic drugs. This court found that Bristol-Myers Squibb ("BMS") had standing to sue, on the ground that "if BMS is correct [about its claim that the FDA's regulations violate the governing statute], *then it is no answer to say that the FDA is merely permitting a competitive product to enter the market and leaving the purchasing decision to the consumer. See Telephone and Data Systems, Inc. v. FCC*, 305 U.S. App. D.C. 195, 19 F.3d 42, 47 (D.C. Cir. 1994) ('injurious private conduct is fairly traceable to the administrative action contested in the suit if that action authorized the conduct or established its legality')." 91 F.3d at 1499 (emphasis added). The dissent seeks to distinguish *Bristol-Myers Squibb Co.* from the present case on the ground that, in the earlier case, the FDA had authorized the distribution of a drug under a legal regime in which no new drug could be marketed without such government approval. *See* Dissent at 15. In other words, *Bristol-Myers Squibb Co.* involved a situation in which private action that was once regulated loosely, or not at all, by the federal government, was now prohibited unless specifically permitted. The plaintiff in *Bristol-Meyers Squibb Co.* claimed that the FDA's exercise of its authorization authority in that instance violated its statutory mandate. *See* 91 F.3d at 1494-95. The dissent has provided no sound grounds for distinguishing the present case. Under the plaintiffs' legal theory in this case, which we accept for purposes of determining their standing to sue, the AWA itself prohibits the allegedly inhumane conditions that injured Mr. Jurnove; the regulatory backdrop for the plaintiffs' claim is that all private exhibitions that involve inhumane treatment of animals are already illegal by statute. Thus here, the plaintiffs are also contending that

the USDA's decision to permit the conditions that allegedly injured Mr. Jurnove violated the agency's statutory mandate.

Motor & Equipment Manufacturers Association ("MEMA") v. Nichols, 142 F.3d 449 (D.C. Cir. 1998), involved a challenge to EPA regulations governing on-board emissions diagnostic devices ("OBDs"). These regulations provided that any car manufacturer who complied with California's stricter OBD requirements would be " 'deemed-to-comply' " with the federal government's OBD requirements. *Id.* at 452. The manufacture of cars meeting California's OBD standards was likely to injure the petitioners (who manufacture, rebuild, and sell spare parts) financially, but the EPA argued that its regulation had not caused this injury because the "deemed-to-comply" policy did not compel auto manufacturers to comply with California's OBD regulations, but simply permitted them to do so. *See id.* at 457. This court rejected that argument, pointing out the incentives that car manufacturers have to take the "deemed-to-comply" route, which allows them to "make one kind of each car they sell instead of two kinds, one of which would be for sale in states that follow California's OBD regulations, and the other for sale in states that follow federal OBD regulations." *Id.* We found causation, in other words, although the government regulation allowed, rather than required, the allegedly injurious third-party conduct, and we also recognized the incentives that third parties often have to minimize their expenditure of money and effort. Some animal exhibitors have similar incentives, of course, to comply with the bare requirements of the governing USDA regulations without exceeding them in any potentially expensive or time-consuming way.

Along the same lines, the plaintiffs in *Telephone and Data Systems, Inc.* had standing to challenge the FCC's grant of "a conditional permit" that allowed a competitor "to construct and operate cellular communications services in the Atlantic City market," but did not require him to do so. 19 F.3d at 44. Similarly, the plaintiffs in *International Ladies' Garment Workers' Union* had standing to challenge a Labor Department regulation that permitted the employment of people working in their homes in the knitted outerwear industry, but did not require manufacturers to employ these workers. *See* 722 F.2d at 799.

Mr. Jurnove's affidavit accordingly falls well within our established causation requirement for constitutional standing. He

alleges that the USDA failed to adopt the specific, minimum standards that the AWA requires. He further describes how the conditions that caused him injury complied with current USDA regulations, and alleges that regulations complying with the AWA would have prohibited those conditions and protected him from the injuries that his affidavit recounts.

C. *Redressibility*

We also find that Mr. Jurnove has satisfied the redressibility element of constitutional standing. Mr. Jurnove's affidavit alleges that he has a current routine of regularly visiting the Game Farm and provides a finite time period within which he will make his next visit, stating that he plans to "return to the Farm in the next several weeks" and to "continue visiting the Farm to see the animals there." Jurnove Affidavit ¶ 43. As the plaintiffs' complaint argues, more stringent regulations, which prohibit the inhumane conditions that have consistently caused Mr. Jurnove aesthetic injury in the past, would necessarily alleviate Mr. Jurnove's aesthetic injury during his planned, future trips to the Game Farm. *See* First Amended Complaint ¶¶ 53, 58. Tougher regulations would either allow Mr. Jurnove to visit a more humane Game Farm or, if the Game Farm's owners decide to close rather than comply with higher legal standards, to possibly visit the animals he has come to know in their new homes within exhibitions that comply with the more exacting regulations.

The Supreme Court's recent decision in *FEC v. Akins*, moreover, rejects the possible counterargument that the redressibility element of constitutional standing requires a plaintiff to establish that the defendant agency will actually enforce any new binding regulations against the regulated third party. There, the plaintiffs, "a group of voters with views often opposed to those of AIPAC [the American Israel Public Affairs Committee]," sought to have AIPAC classified as a "political committee" within the meaning of the Federal Election Campaign Act ("FECA"), which "imposes extensive recordkeeping and disclosure requirements upon groups that fall within the Act's definition of a 'political committee.'" 118 S. Ct. at 1781-82. The FEC argued that these plaintiffs had not established either causation or redressibility, on the ground that, even if the Commission had accepted the plaintiffs' interpretation of FECA, "it is possible that . . . [the FEC] would still have decided in the exercise of its discretion not to require AIPAC

to produce the information." *Id.* at 1786. The Supreme Court soundly rejected this argument, noting:

> that fact does not destroy Article III 'causation' [or redressibility,] for we cannot know that the FEC would have exercised its prosecutorial discretion in this way. Agencies often have discretion about whether or not to take a particular action. Yet those adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground. If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case – even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason.

Id. (citations omitted).

Mr. Jurnove, accordingly, has met all three of the constitutional requirements for standing.

D. *Prudential Standing/Zone of Interests*

Mr. Jurnove also falls within the zone of interests protected under the AWA's provisions on animal exhibitions. As the Supreme Court has recently reaffirmed, the zone of interests test is generous and relatively undemanding. "There need be no indication of congressional purpose to benefit the would-be plaintiff." *National Credit Union Admin. v. First National Bank & Trust Co.*, 140 L. Ed. 2d 1, 118 S. Ct. 927, 934 (1998) (citation and quotation marks omitted). Instead, the test, a gloss on APA § 10(a), 5 U.S.C. § 702 (1994), asks only "whether the interest sought to be protected by the complainant is *arguably* within the zone of interests to be protected by the statute," *National Credit Union Admin.*, 118 S. Ct. at 935 (citation, internal quotation marks, and alteration omitted); *see also Akins*, 118 S. Ct. at 1783 ("Prudential standing is satisfied when the injury asserted by a plaintiff arguably falls within the zone of interests to be protected or regulated by the statute in question.") (citation, internal quotation marks, and alterations omitted). Our circuit has further explained that "this analysis focuses, not on those who Congress intended to benefit, but on those who in practice can

be expected to police the interests that the statute protects." *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1075 (D.C. Cir. 1998); *see also ALDF I*, 23 F.3d at 502 ("The [zone of interests] test precludes review of administrative action if the particular interest asserted is 'so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.' ") (quoting *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399, 93 L. Ed. 2d 757, 107 S. Ct. 750 (1987)); *Autolog Corp. v. Regan*, 235 U.S. App. D.C. 178, 731 F.2d 25, 29-30 (D.C. Cir. 1984) ("The zone of interests test requires some indicia – however slight – that the litigant before the court was intended to be protected, benefitted or regulated by the statute under which suit is brought. Courts should give broad compass to a statute's zone of interests in recognition that this test was originally intended to *expand* the number of litigants able to assert their rights in court.") (citations and internal quotation marks omitted).

In this case, logic, legislative history, and the structure of the AWA, all indicate that Mr. Jurnove's injury satisfies the zone of interests test. The very purpose of animal exhibitions is, necessarily, to entertain and educate people; exhibitions make no sense unless one takes the interests of their human visitors into account. The legislative history of both the 1985 amendments to the Animal Welfare Act and the 1970 act that first included animal exhibitions within the AWA confirms that Congress acted with the public's interests in mind.

In introducing the 1985 amendments, Senator Robert Dole explained "that we need to ensure *the public* that adequate safeguards are in place to prevent unnecessary abuses to animals, and that everything possible is being done to decrease the pain of animals during experimentation and testing." 131 CONG. REC. 29,155 (1985) (statement of Sen. Dole) (emphasis added). The Congressmen who went on the House floor to introduce the act that first extended the AWA to cover animal exhibitions recognized that their bill "had been a focal point of concern among animal lovers throughout the Nation for some time" and spoke of the "great pleasure" that animals bring to the people who see them. 116 CONG. REC. 40,159 (1970) (statement of Rep. Mizell); *see also* H.R. Rep. No. 91-1651, at 1 (1970) ("Beginning with the legislation passed in 1966 (Public Law 89-544), the United States

Government has implemented a statutory mandate that small helpless creatures deserve the care and protection of a strong and enlightened *public*.") (emphasis added). Indeed, Congress had placed animal exhibitions within the scope of the AWA after hearings documenting how inhumane conditions at these exhibitions affected the people who came and watched the animals there. *See Care of Animals Used for Research, Experimentation, Exhibition, or Held for Sale as Pets: Hearings on H.R. 13957 Before the Subcomm. on Livestock and Grains of the House Comm. on Agriculture*, 91st Cong. 38 (1970) (letter from John M. Mehrtens) [hereinafter *Hearings*]; *id.* at 39 (letter from Chris Sullivan); *Id.* at 67 (statement of Pearl Twyne); *id.* at 79 (statement of Mary Frances Morrisette).

Throughout, the Congressmen responsible for including animal exhibitions within the AWA encouraged the continued monitoring of humane societies and their members. They spoke, for instance, of how America had long depended on humane societies to bring the mistreatment of animals to light. *See, e.g.*, 116 CONG. REC. 40,305 (1970) (statement of Rep. Whitehurst). The Congressmen further acknowledged that humane societies were the moving force behind the legislation to include animal exhibitions within the AWA. *See, e.g.*, 116 CONG. REC. 40,156 (1970) (statement of Rep. Foley).

The structure of the AWA also makes clear that Mr. Jurnove falls within the statute's zone of interests. While the AWA establishes oversight committees with private citizen members for research facilities, *see* 7 U.S.C. § 2143(b)(1) (1994), it created no counterpart for animal exhibitions. But, as the legislative history shows, the AWA anticipated the continued monitoring of concerned animal lovers to ensure that the purposes of the Act were honored. Mr. Jurnove, a regular viewer of animal exhibitions regulated under the AWA, clearly falls within the zone of interests the statute protects. His interests are among those that Congress sought to benefit through the AWA, and he certainly is one of the individuals "who in practice can be expected to police the interests that the statute protects." *Mova Pharmaceutical Corp.*, 140 F.3d at 1075.

III. CONCLUSION

Mr. Jurnove has standing to sue. He satisfies the injury, causation, and redressibility elements of constitutional standing, and

also falls within the zone of interests for the Animal Welfare Act. We accordingly have no need to consider the standing of the other individual plaintiffs. We leave a determination of the merits of the plaintiffs' claim to a future panel of this court.

So ordered.

Circuit Judge SENTELLE, with whom JUDGE SILBERMAN, JUDGE GINSBURG, and JUDGE HENDERSON join, dissenting:

Marc Jurnove visited the Long Island Game Farm about a dozen times over the course of a year and was upset by the conditions of the primates he saw there. Some primates were kept in isolation; others were kept in cages without sufficient "cage enrichment devices"; and still others were kept in cages that were not properly maintained. At Jurnove's urging, the United States Department of Agriculture inspected the Game Farm several times, but failed to take steps to improve these conditions. Frustrated by USDA's ineffectiveness, Jurnove filed a lawsuit seeking the invalidation of federal regulations concerning the treatment of primates on the grounds that those regulations failed to live up to the mandate of the Animal Welfare Act. At issue is whether Jurnove had standing to bring this suit.

The majority concludes that Jurnove has a cognizable constitutional interest in viewing particular primates kept under humane conditions, and finds Jurnove's claimed injuries fairly traceable to USDA's failure to promulgate tougher regulations and redressable by a judicial order forcing USDA to promulgate such regulations. Because I believe the majority significantly weakens existing requirements of constitutional standing, I dissent.

I.

Under Article III of the Constitution, the "judicial power" of the United States is limited to the resolution of "Cases" or "Controversies." U.S. Const. art. III, § 2. Like the other doctrines of justiciability associated with Article III (for example, mootness, ripeness and political question), the doctrine of standing "states fundamental limits on federal judicial power in our system of government." *Allen v. Wright*, 468 U.S. 737, 750, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984). Standing – "perhaps the most important of these doctrines," *id.* – involves the question of "whether the litigant

is entitled to have the court decide the merits of the dispute or of particular issues." *Id.* at 750-51 (quoting *Warth v. Seldin*, 422 U.S. 490, 498, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975)).

At an "irreducible minimum," Article III standing requires those invoking the jurisdiction of a federal court to demonstrate an (1) injury-in-fact; (2) which is caused by, or is fairly traceable to the defendant's alleged unlawful conduct; and (3) which is likely to be redressed by a favorable decision of the court. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982); *see also Bennett v. Spear*, 520 U.S. 154, 117 S. Ct. 1154, 1161, 137 L. Ed. 2d 281 (1997); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992). A would-be federal litigant must "clearly and specifically set forth facts sufficient to satisfy these Art. III standing requirements." *Whitmore v. Arkansas*, 495 U.S. 149, 155, 109 L. Ed. 2d 135, 110 S. Ct. 1717 (1990).

By imposing these requirements, Article III limits the power of the federal judiciary to "those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Valley Forge*, 454 U.S. at 472 (quoting *Flast v. Cohen*, 392 U.S. 83, 97, 20 L. Ed. 2d 947, 88 S. Ct. 1942 (1968)); *see also Allen*, 468 U.S. at 750 (case-or-controversy doctrines are "founded in concern about the proper – and properly limited – role of the courts in a democratic society") (quoting *Warth*, 422 U.S. at 498). Article III standing is "not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit which a party desires to have adjudicated." *Valley Forge*, 454 U.S. at 476. To the contrary, it is an "essential and unchanging part of the case-or-controversy requirement of Article III." *Defenders of Wildlife*, 504 U.S. at 560.

A federal court deciding matters outside the scope of Article III, then, exercises power that is "not judicial . . . in the sense in which judicial power is granted by the Constitution to the courts of the United States." *Valley Forge*, 454 U.S. at 471 (quoting *United States v. Ferreira*, 54 U.S. 40, 13 HOW 40, 48, 14 L. Ed. 42 (1852)). To permit a federal court to rule on the claims of a plaintiff lacking Article III standing would "create the potential for abuse of the judicial process, distort the role of the Judiciary in its

relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'" *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222, 41 L. Ed. 2d 706, 94 S. Ct. 2925 (1974). Thus, "the powers of the federal judiciary will be adequate for the great burdens placed upon them *only if they are employed prudently*, with recognition of the strengths as well as the hazards that go with our kind of representative government." *Id.* (emphasis added) (quoting *Flast*, 392 U.S. at 131 (Harlan, J., dissenting)).

It is therefore imperative to exercise prudence when deciding a case – like the case before us today – that would lower existing Article III barriers to standing. We should not lightly tinker with the constitutional source of federal judicial power, *see Whitmore*, 495 U.S. at 161, even when we may sympathize with the ideological goals of plaintiffs in a particular case. *Id.* (rejecting a "relaxed application of standing principles"; concluding that "it is not for this Court to employ untethered notions of what might be good public policy to expand our jurisdiction in an appealing case").

With these principles in mind, I turn now to Marc Jurnove's claims of Article III standing.

II.

A. Injury-in-Fact

The first of the familiar triad of requirements for constitutional standing is "injury in fact," which is an "invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Defenders of Wildlife*, 504 U.S. at 560 (citations and internal quotation marks omitted). The majority concludes that Jurnove has articulated a "concrete and particularized" injury to his "legally protected interest" in "observing animals living under humane conditions." Majority at 22; *see also* First Amended Complaint ¶ 43 (alleging that Jurnove has an "aesthetic, recreational, personal and educational interest in observing, photographing, writing about, learning about and interacting with wild and exotic animals kept in humane environments").

Despite the majority's assertion to the contrary, *see* Majority at 21-22, today's ruling is indeed a departure from existing aesthetic injury jurisprudence. Granted, "the desire to use or observe

an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing." *Defenders of Wildlife*, 504 U.S. at 562-63. However, as we have observed before, the Supreme Court cases addressing aesthetic injury resulting from the observation of animals are limited to cases in which governmental action threatened to reduce the number of animals available for observation and study. *See Humane Society v. Babbitt*, 310 U.S. App. D.C. 228, 46 F.3d 93, 97 (D.C. Cir. 1995) (citing *Sierra Club v. Morton*, 405 U.S. 727, 734, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972); *Defenders of Wildlife*, 504 U.S. at 563; *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 231 n.4, 92 L. Ed. 2d 166, 106 S. Ct. 2860 (1986)).

Nor has this circuit previously crossed this diminution-of-the-species line and found the existence of a constitutional interest in the conditions under which one views animals. The majority misleadingly suggests that we did so in *Animal Welfare Institute v. Kreps*, 183 U.S. App. D.C. 109, 561 F.2d 1002, 1007 (D.C. Cir. 1977). In fact, that decision does not make it at all clear what the nature of the injury is which the court found sufficient. On this cited page, under the heading "Traditional Analysis . . . Injury in Fact," the court quoted more than a full column of the plaintiffs' complaint cataloging various allegations of injury. Without specifying what part of the plaintiffs' allegations of injury made out standing, the opinion goes on to note that "the District Court agreed that appellants' interests were cognizable," but had held that appellants lacked standing because the injury was not personal to them, as opposed to being shared with "any other concerned citizen." 183 U.S. App. D.C. 109, 561 F.2d 1002 at 1008. Our opinion then goes on to discuss the sufficiency of the allegations that specific members of the plaintiff group intended to conduct the observations underlying their factual allegations. Insofar as the majority claims that our decision adopted the view that the conditions of observation constitute a cognizable interest such that interference therewith constitutes injury-in-fact for Article III standing purposes, the opinion simply will not bear that weight.

In that case, environmental groups had filed a lawsuit that challenged a decision by the Secretary of Commerce to waive a statutory moratorium on the taking or importation of marine mammals or marine mammal products. The result of the government's decision was to permit baby fur sealskins to be

imported into the United States from South Africa. *Id.* at 1004. The plaintiffs alleged in their lawsuit that the government's action would "contribute to the death and injury of marine mammals and injury to the ecosystem of the South Atlantic Ocean." *Id.* at 1007. The plaintiffs articulated their aesthetic injury as follows:

> Through sanctioning the seal harvesting method of the South African Government, the [Secretary's] decision impairs the ability of members of the Plaintiff organizations to see, photograph, and enjoy Cape fur seals alive in their natural habitat under conditions in which the animals are not subject to excessive harvesting, *inhumane treatment* and slaughter of pups that are very young and still nursing.

Id. (emphasis added). Citing *Sierra Club*, the *Animal Welfare Institute* court determined that the plaintiffs had stated a cognizable injury-in-fact. *Id.* at 1007-08.

The majority avers that the *Animal Welfare Institute* court recognized a cognizable interest in viewing seals free from inhumane treatment. Majority at 12-13. However, as the opinion makes clear, "inhumane treatment," as it appears in the above quotation and in the Marine Mammal Protection Act, is a term of art referring to the manner in which seals are killed: plaintiffs argued on the merits that "humane" killing of seals, within the meaning of that statute, involved killing with a single blow (and they argued, unsuccessfully, that South African harvesting practices did not live up to this degree of "humaneness"). *See id.* at 1012-13; 16 U.S.C. § 1362(4) (1975). *Animal Welfare Institute*, then, involved allegations that governmental action will "contribute to the death" of seals. *Id.* at 1007. Accordingly, this case falls squarely within the line of Supreme Court precedents recognizing claims of aesthetic injury to governmental action diminishing the opportunity to observe, not affecting the quality of the observation.

The majority also cites *Humane Society v. Hodel*, 268 U.S. App. D.C. 165, 840 F.2d 45 (D.C. Cir. 1988), seemingly for the proposition that viewing animals free from inhumane treatment is a constitutionally cognizable injury. Majority at 13. But this case too comes within the Supreme Court's diminution-of-the-species parameters, specifically recognizing as cognizable the "depletion

[of] the supply of animals and birds that refuge visitors seek to view." 840 F.2d at 52.

Although the Supreme Court and this circuit have not recognized a cognizable injury-in-fact to an aesthetic interest based on the circumstances of observation, that does not mean that interference with such an interest could not amount to a constitutional injury-in-fact. Rather, as I set forth above, I believe it is necessary to proceed with caution when venturing into constitutionally uncharted waters. *See* Section I., *supra*.

Having removed the diminution-of-the-species touchstone of existing case law, the majority opens an expanse of standing bounded only by what a given plaintiff finds to be aesthetically pleasing. Aesthetic injury is, by its nature, a matter of individual taste. For example, although Jurnove might find it aesthetically pleasing to view primates kept in groups, another person might prefer to watch them kept alone. Still another person might prefer to see primates in brightly colored cages, or in cages in which recordings of Mozart piano concertos are played around the clock, or not in cages at all. Under the majority's theory, it appears that Article III encompasses the injury of a person who states that he has an aesthetic interest in seeing primates kept under such conditions, and that he believes primates that are not kept under these conditions are treated inhumanely.

Jurnove's injury, recognized by the majority as constitutionally cognizable, is in seeing particular animals treated humanely. "Humane" is defined as "marked by compassion, sympathy, or consideration for other human beings or animals." WEBSTER'S NEW COLLEGIATE DICTIONARY 556 (1973). Humaneness, like beauty, is in the eye of the beholder: one's individual judgment about what is or is not humane depends entirely on one's personal notions of compassion and sympathy. I find it difficult to imagine a more subjective concept than this.

Furthermore, as the majority acknowledges, the reasoning of its opinion is not limited to humaneness. The majority recognizes an aesthetic injury in viewing animals in any manner that does not comport with a plaintiff's individual taste. According to the majority's theory, a sadist with an interest in seeing animals kept under inhumane conditions is constitutionally injured when he views animals kept under humane conditions. In so doing, the

majority labors mightily, but unpersuasively, to limit the reasoning of its holding to the recognition of an aesthetic injury that results from the *inhumane* treatment of animals. For example, the majority disputes that the hypothetical sadist with an interest in seeing animals kept under inhumane conditions would be constitutionally injured by viewing animals kept under humane conditions. The majority explains the constitutional infirmity of the sadist's claims by stating that only "legally protected" injuries fall within the Article III injury-in-fact test. *See* Majority at 14 n.7 (citing *Defenders of Wildlife*, 504 U.S. at 560). According to the majority, the sadist's injuries are not "legally protected" "because the [Animal Welfare Act] . . . recognizes no interest in sadism." *Id.* But by relying on the nature of the injury recognized by a governing statute as "legally protected," the majority improperly conflates the prudential zone-of-interests analysis with the Article III injury-in-fact analysis. The majority's attempt to blend these conceptually distinct tests is logically incoherent, and in no way cures the ill-defined and essentially subjective nature of the asserted injury before us today.

In recognizing Jurnove's purely subjective injury, the majority radically departs from our precedent. For example, we refused to recognize "purely subjective" claims of injury that could not be measured by "readily discernible standards" in *Metcalf v. National Petroleum Council*, 180 U.S. App. D.C. 31, 553 F.2d 176, 187 (D.C. Cir. 1977) (citing *Laird v. Tatum*, 408 U.S. 1, 13-14, 33 L. Ed. 2d 154, 92 S. Ct. 2318 (1972)). One such "purely subjective" claim of injury in that case was raised by United States Senator Lee Metcalf. Metcalf claimed that the National Petroleum Council was unlawfully operating as a federal advisory committee because its membership was not "fairly balanced" as required by the Federal Advisory Committee Act. Metcalf, at the time the chairman of a Senate subcommittee on Minerals, Materials and Fuels, alleged that the Council was providing him with biased information, thus "impeding [him] in his efforts to develop the best possible legislative product." 553 F.2d at 185-86.

In rejecting Metcalf's proposed injury in fact, we specifically targeted the "purely subjective nature of his asserted injury":

> [Metcalf's] injury derives from his belief that he cannot produce the "best possible legislative

> product" because of the Council's allegedly tainted advice. There are no objective standards to determine when a legislative product is the "best" that it can be; such a determination necessarily rests on each legislator's individual view of the countless variety of factors which go into the formulation of legislation. Were we to accept the pure subjectivity put forth by appellant Metcalf in his capacity as an individual legislator, the federal courts would become a forum for the vindication of value preferences with respect to the quality of legislation enacted by our national legislature. Such a role for the courts is clearly inconsistent with the "cases or controversies" limitation of Article III.

Id. at 188.

Just as a legislator's view of what legislation is "best" depends solely on the value preferences of the legislator, so does Jurnove's notion of what is "humane" depend solely on his own value preferences. And no objective standard could possibly measure degrees of a concept – humaneness – that is based entirely on one's subjective emotions. Under existing law, a plaintiff may establish a "concrete and particularized" injury when his interest in observing or studying animals is directly affected by the reduction in the number of animals to be viewed or studied. Today's decision goes much further, recognizing an aesthetic injury based solely on a plaintiff's subjective emotional response to something he sees. Under today's decision, one's individual preference in viewing animals in a particular way is thought to be constitutionally injured when government regulations do not require the animals to be kept in a way that comports with one's taste. I would follow *Metcalf* and hold that such a purely subjective injury is outside the boundaries of Article III. The majority's contrary conclusion amounts to constitutional recognition of the "psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge*, 454 U.S. at 485. *Valley Forge*, among many other cases, makes it plain that this is "not an injury sufficient to confer standing under Art. III" *Id.*; *see also Humane Society v. Babbitt*, 310 U.S. App. D.C. 228, 46 F.3d 93, 98 (D.C. Cir. 1995) ("General emotional 'harm,' no matter how deeply felt, cannot

suffice for injury-in-fact for standing purposes.") (citing additional cases).

The majority accuses the panel opinion of "importing . . . a requirement into our standing doctrine so late in the day" by requiring a diminution in the opportunity to observe in order to establish cognizable injury to aesthetic interests. Majority at 21. This statement fundamentally misunderstands not only our precedent but the nature of standing. No one was "importing" a new requirement. We simply have not been asked before to find standing where the sole alleged injury is an interference with the aesthetic taste of the plaintiff. To pass on that novel question at its first appearance is not "late in the day." It is simply the first time it has been necessary to decide whether we will conclude that constitutional standing extends to an area in which it has not previously been asserted.

In short, Jurnove's asserted injuries are not "traditionally thought to be capable of resolution through the judicial process." *See Valley Forge*, 454 U.S. 464 at 472 (quoting *Flast*, 392 U.S. 83 at 97). Accordingly, I would find that he has not met his burden of demonstrating a cognizable injury-in-fact. This conclusion alone would bar Jurnove from seeking relief in federal court. *Florida Audubon Soc'y v. Bentsen*, 320 U.S. App. D.C. 324, 94 F.3d 658, 662 (D.C. Cir. 1996) (en banc).

B. Causation

Even if I shared my colleagues' belief that an interference with a plaintiff's aesthetic sensibilities absent a diminution in the opportunity to exercise those sensibilities is sufficient to make out the injury-in-fact element of constitutional standing, I still could not conclude that the plaintiffs had established that Jurnove has constitutional standing on the present complaint. Even if such an injury were cognizable, and even if the complaint has set forth that cognizable injury, their attempt at standing stumbles at the second stile: they have not established causation.

In analyzing the "causation" element of constitutional standing, we ask whether it is "substantially probable" that the challenged acts of the defendant – as opposed, for example, to the acts of an absent third party – caused a plaintiff's particularized injury. *Florida Audubon Soc'y*, 94 F.3d at 663 (citations omitted). Causation, therefore, is related to but distinct from "redressability,"

which requires that the relief sought by the plaintiffs is likely to alleviate the plaintiff's injury. *Id.* at 663-64.

When a plaintiff asserts injuries attributed to "the government's allegedly unlawful regulation (or lack of regulation) of *someone else*," *Defenders of Wildlife*, 504 U.S. at 562 (emphasis in original), the causation and redressability elements of standing analysis "require more exacting scrutiny." *Freedom Republicans, Inc. v. Federal Election Comm'n*, 304 U.S. App. D.C. 289, 13 F.3d 412, 416 (D.C. Cir.) (Wald, J.), *cert. denied*, 513 U.S. 821, 130 L. Ed. 2d 36, 115 S. Ct. 84 (1994). Under these circumstances, standing is not necessarily precluded, but the "indirectness of injury 'may make it substantially more difficult to meet the minimum requirements of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm.' " *Id.* (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 44-45, 48 L. Ed. 2d 450, 96 S. Ct. 1917 (1976)). A plaintiff who claims to have been injured by the government's regulation of a third party must "adduce facts showing that the unfettered choices made by independent actors have been or will be made in such manner as to produce causation and permit redressability of injury." 13 F.3d at 417 (brackets omitted) (quoting *Defenders of Wildlife*, 504 U.S. at 562).

The majority concludes that Jurnove has met his burden of establishing that his claimed aesthetic injury is fairly traceable to government action. Jurnove's argument, accepted by the majority, proceeds: (1) Jurnove was aesthetically injured when he saw primates he believed to be mistreated at the Game Farm; (2) the manner in which the Game Farm treated the primates was permitted under existing regulations; (3) existing regulations are not tough enough because they do not include "minimum standards" as required by the Animal Welfare Act; (4) by failing to promulgate tough regulations that comply with the AWA, USDA is responsible for the aesthetic injuries Jurnove suffered by viewing primates at the Game Farm. Since Jurnove is asserting injuries attributed to the government's regulation of a third party, his claims of causation must be considered with "exacting scrutiny." *Freedom Republicans*, 13 F.3d at 416.

The cornerstone of Jurnove's claims of causation is that existing regulations permit the conditions that troubled him. Indeed, the majority stresses the fact that USDA's repeated inspections of

the Game Farm revealed no (or few) violations.[1] *See* Majority at 25-26. However, the gravamen of the affidavit is not that the events Jurnove witnessed were legal, but that USDA is shirking its obligation to enforce the law, and is only halfheartedly inspecting the Game Farm in order to mollify Jurnove. Jurnove explicitly states that he has "concluded that the USDA was just 'going through the motions' to placate [him] because of [his] many calls and submissions [complaining about the treatment of Game Farm primates]." Jurnove Affidavit ¶ 41. Furthermore, Jurnove states that he "knew that the USDA inspection report [finding the Game Farm in compliance with existing regulations] was incorrect." *Id.* at ¶ 19; *see also id.* at ¶ 21 (alleging that the USDA inspection report of July 21, 1995 included nothing about conditions that Jurnove says were "required by USDA regulations"). In light of the thrust of the affidavit (that USDA went through the motions and wrote up incorrect reports), Jurnove's legal claims of causation (that the regulations *permitted* the conditions he witnessed) seem disingenuous. *See* 10A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 2721, at 365 (1998) ("The formal

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[1] I note that we are reviewing the district court's entry of summary judgment in favor of Jurnove and his co-plaintiffs. This fact determines our standard of review: "while a motion to dismiss may be decided on the pleadings alone, construed liberally in favor of the plaintiff, a motion for summary judgment by definition entails an opportunity for a supplementation of the record, and accordingly a greater showing is demanded of the plaintiff." *Wilderness Society v. Griles*, 262 U.S. App. D.C. 277, 824 F.2d 4, 16 (D.C. Cir. 1987) (finding plaintiffs' allegations in summary judgment context to be insufficiently specific to meet their burden of establishing constitutional standing); *see also Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 45 n.25, 48 L. Ed. 2d 450, 96 S. Ct. 1917 (1976) (acknowledging that a complaint's standing allegations "withstood a motion to dismiss, although [they] might not have survived challenge on a motion for summary judgment"). Jurnove's affidavit was submitted in support of his motion for summary judgment. Rule 56(e) of the Federal Rules of Civil Procedure requires such affidavits to be "made on personal knowledge; [to] set forth such facts as would be admissible in evidence, and [to] show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e). Clearly, Jurnove would not have been permitted to testify about the conclusions of USDA examiners (that the Game Farm was in compliance with regulations) because those conclusions are hearsay and not based on Jurnove's personal knowledge. However, because the government never filed a motion to strike the hearsay portions of Jurnove's affidavit, it waived its objections to them, and we may appropriately consider them now in the absence of a "gross miscarriage of justice." *See* 10B WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 2738, at 372-73 (1998).

issues framed by the pleadings are not controlling on a motion for summary judgment. . . .").

According to the majority, causation is established if a plaintiff demonstrates that challenged governmental action "authorizes" the plaintiff's injuries. But the majority uses the term "authorize" in a very loose way. For example, 9 C.F.R. § 3.81(a)(3) provides that "individually housed nonhuman primates must be able to see and hear nonhuman primates of their own or compatible species unless the attending veterinarian determines that it would endanger their health, safety, or well-being." According to the majority, this regulation authorized the Game Farm to house nonhuman primates out of the sight or hearing of other primates. Majority at 23.

The majority's view of "authorization" here is beyond expansive. The regulation says that individually housed primates must be able to see and hear other primates unless the attending veterinarian determines otherwise. Thus, one of two things must be true under existing law if a primate were housed out of the sight or hearing of other primates. Either the attending veterinarian determined that housing such a primate within the sight or hearing of another primate "would endanger their health, safety, or well-being," or the veterinarian did not, in which case the housing of the primate would violate the regulation. According to the majority, the regulation authorizes inhumane treatment of primates. How? An exhibitor that "*secured the approval of the veterinarian in its employ* could comply with the regulation without actually housing nonhuman primates within the sight or sound of other primates." *Id.* (emphasis added). The obvious innuendo of this sentence is that an exhibitor could bribe its staff veterinarian to determine falsely that a given primate's "health, safety, or well-being" would be endangered, thus permitting the primate to be housed away from the sight or sound of other primates.[2] But if this were so, any inhumane

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[2] The majority suggests, without record citation, that appellant's concern is not with bribery, but rather "that the regulation gives exhibitors too much leeway to shop around for a compliant veterinarian and that placing such broad and unguarded discretion in the hands of the veterinarian in an exhibitor's own employ is an insufficient safeguard to protect primate well being." Majority at 23-24. This does not change the applicable analysis. A claim of authorization through wide discretion is effectively the same as (or close enough to) authorization through

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treatment would be the result of the exhibitor's failure to follow existing regulations, and would not be traceable to the regulations themselves.

The majority also addresses the causation of Jurnove's alleged aesthetic injury in seeing squirrel monkeys housed next to adult bears "repeatedly walking over to the door and sniffing and acting very upset when the bears came near." Jurnove Affidavit ¶ 11. The majority acknowledges that under existing regulations, "nonhuman primates may not be housed with other species of primates or animals unless they are compatible." Majority at 24 (citing 9 C.F.R. § 3.81(a)(3)). It emphasizes, however, that this provision is not applicable here because it does not "expressly regulate" incompatible animals housed next to each other, but in separate cages. *Id.* The majority's causation analysis comes down to this: when a provision does not "expressly regulate" certain treatment, the regulations "authorize" such treatment. *See also* Majority at 24-25 (asserting that a regulation that included no "specific requirements governing the particular kind or number of enrichment devices" *authorized* the Game Farm's decision to furnish a cage with only one swing). Surely this analysis proves too much. There are an infinite variety of things not "expressly regulated" by section 3.81, and according to the majority's reasoning any injury caused by those things is fairly traceable to the government's failure to "expressly regulate" them. I cannot subscribe to such a wide-ranging theory of causation.

I find frightening at a constitutional level the majority's assumption that the government causes everything that it does not prevent. The majority rejects as "a false premise" the proposition that "the proper comparison for determining causation is . . . between what the agency did and the status quo before the agency acted." Majority at 29. I submit that consistent with our constitutional tradition of limited government that is precisely the correct premise for causation. The cases offered by the majority, *Investment Co. Institute v. Camp*, 401 U.S. 617, 28 L. Ed. 2d 367, 91 S. Ct. 1091 (1971); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 27 L. Ed. 2d 179, 91 S. Ct. 158 (1970); and *Barlow v. Collins*, 397 U.S. 159, 25 L. Ed. 2d 192, 90 S. Ct. 832 (1970), are not to the

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failure to forbid as to fall far outside of the kind of express authorization required for Article III causation.

contrary. In each of those decisions the alleged injury arose from conduct on the part of a regulated entity whose conduct was *expressly* authorized by some regulation enacted by the sued regulator. Thus, there was an express authorization *caused* by the government defendants. In the present case, Jurnove has pointed to no such express authorization of any conduct that inflicts his alleged injuries.

Nor do decisions of our circuit sweep into causation the full expanse of all conduct not forbidden by the alleged causer. *Bristol-Myers Squibb Co. v. Shalala*, 320 U.S. App. D.C. 32, 91 F.3d 1493 (D.C. Cir. 1996), did not, as the majority claims, "explicitly reject[ ] the distinction between permissive and mandatory government regulation." Majority at 30. That case involved regulations that governed the approval of new generic drugs which could not be marketed under relevant conditions without the regulator's approval. *Bristol-Myers*, 91 F.3d at 1494-95. In light of the fact that the regulator explicitly authorized the conduct at issue, there was a neat causal fit between the authorization and the act that allegedly caused the injury.

Telephone and Data Systems, Inc. v. FCC, 305 U.S. App. D.C. 195, 19 F.3d 42 (D.C. Cir. 1994), upon which the Bristol-Myers court and derivatively the majority today rely, is also not to the contrary. It supports the distinction between the authorization of particular conduct and the failure to prevent it. In Telephone and Data Systems, the FCC had entered an order which authorized the operation of a licensed entity under certain conditions, and another which would merely allow the transfer of a particular license. In the portion cited by the majority, we held that an appellant allegedly injured by the conduct expressly authorized by the FCC in the first order had made out causation. 19 F.3d at 47. In a portion of the opinion not cited by the majority, we held that the same appellant had not made out causation in its allegation of potential anticompetitive collusion on the part of the potential transferee. *Id.* at 48. In no part of the opinion did we provide any precedent for the proposition that a bare failure to prevent conduct by regulation is tantamount to causation.

The remainder of the cases cited by the majority are simply a repetition of the same refrain. *See Motor & Equipment Manufacturers Assoc. v. Nichols*, 142 F.3d 449, 457 (D.C. Cir. 1998) (holding that a competitive injury was fairly traceable to

EPA's deemed-to-comply rule because the regulation "created a tremendous incentive for manufacturers to install [on-board emissions diagnostic devices] that comply with California's regulations in all their cars"); *Louisiana Energy and Power Authority v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998) (holding that a competitive injury was fairly traceable to FERC's decision to "lift regulatory restrictions on their competitors"); *International Ladies' Garment Workers' Union v. Donovan*, 232 U.S. App. D.C. 309, 722 F.2d 795, 799 (D.C. Cir. 1983) (holding that the petitioners had standing to challenge the Secretary of Labor's decision to "rescind longstanding restrictions on the employment of workers in their homes (homeworkers) in the knitted outerwear industry"). In each of these cases, we reasoned that the commercial conduct of third parties was fairly traceable to the government, because the conduct was expressly authorized by the government's economic regulation. In contrast, Jurnove can point to no such authorization. It is no answer to say that USDA's regulations do not *prohibit* the allegedly inhumane conditions that he observed at the Game Farm. What matters, under our consistent case law, is whether the third party conduct follows directly on the heels of a government decision that affirmatively approved that conduct. Jurnove has made no such submission.

C. Redressability

I would further hold that Jurnove fails the test of redressability. To explain why I find his claims of redressability wanting, I offer this example. Jurnove claims that he was aesthetically injured by viewing primates with inadequate cage enrichment devices. In particular, he states that he was disturbed by viewing a Japanese Snow Macaque housed in a cage with only one such cage enrichment device: an unused swing. Jurnove Affidavit ¶ 14. He takes issue with the existing regulation concerning such devices because they violate the Animal Welfare Act's minimum standards mandate. The regulation provides that "the physical environment in the primary enclosures must be enriched by providing means of expressing noninjurious species-typical activities." 9 C.F.R. § 3.81(b). According to Jurnove (and the majority), these regulations authorized the Game Farm to keep primates in an offensive single-swing cage.

To find redressability on Jurnove's claims would require that we ignore the well-established rule that Article III standing

requires it to "be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 117 S. Ct. 1154, 1163, 137 L. Ed. 2d 281 (1997); *accord Defenders of Wildlife*, 504 U.S. at 560-61.

How would a judicial order invalidating section 3.81(b) and directing USDA to promulgate a new regulation redress Jurnove's claims of aesthetic injury? Under Jurnove's theory, to comply with the "minimum standards" mandate of the AWA, the new regulation would require certain specific cage enrichment devices to be included. But due to the fuzzy nature of Jurnove's asserted injury, it would require sheer speculation to presume that any enrichment devices specified in a future regulation would satisfy Jurnove's aesthetic tastes. We only know that Jurnove does not like seeing primates kept in cages with only one enrichment device. We do not know what conditions would satisfy his individual taste. We do not know, for example, how many enrichment devices Jurnove would prefer to see, or of what type.

This problem – how could we possibly know whether a future regulation comports with Jurnove's aesthetic interests – is directly related to the nature of Jurnove's claimed injury itself. When an animal viewer asserts an aesthetic interest in not seeing a species diminished, it is easy to tell when that injury is redressed: a judicial order may prevent the government from diminishing the species. But when, as here, a plaintiff asserts that a regulation has injured an unquantifiable interest (the plaintiff's own taste), it seems to me nearly impossible to redress such an injury by a general court order directing the government to try again.

Furthermore, as the majority acknowledges, an order directing USDA to promulgate tougher standards might result in the Game Farm's deciding to sell its primates to another exhibitor who is willing to abide by the new regulation. The majority views this scenario as "protecting Mr. Jurnove's aesthetic interest in observing animals living under humane conditions." Majority at 25. It is difficult to fathom how this is so. As the majority acknowledges, Jurnove's interest is in seeing particular primates – that is, the Game Farm primates – kept under certain conditions. But if the Game Farm primates are sold to another exhibitor, presumably Jurnove (who "enjoys seeing [animals] in various zoos and other parks *near [his] home*," Jurnove Affidavit ¶ 7 (emphasis added)) would not be able to see the Game Farm primates at all, much less under humane

conditions. The relief he seeks may well result in his not being able to view the Game Farm primates at all. This too undercuts Jurnove's claims of redressability.

III.

Marc Jurnove says that he objects to a federal regulation because it permits results that offend his aesthetic interests. Due to the majority's expansive reading of standing doctrine,[3] Jurnove may ask a court to force USDA to promulgate a new regulation that comports with his individual notion of aesthetics. Jurnove's complaints, formerly addressable only by the political branches, may now be aired in federal court.

I am reminded of Justice Powell's remark that "relaxation of standing requirements is directly related to the expansion of judicial power." *United States v. Richardson*, 418 U.S. 166, 188, 41 L. Ed. 2d 678, 94 S. Ct. 2940 (1974) (Powell, J., concurring). Indeed, I believe Justice Powell's warnings concerning federal taxpayer or citizen standing have particular resonance here, and are worth quoting at length:

> It seems to me inescapable that allowing unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government. I also believe that repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches. We should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a

[3] The majority concludes that Jurnove has established prudential standing, as well as constitutional. Because I do not believe Jurnove has established constitutional standing, I find it unnecessary to address prudential standing here.

> nonrepresentative, and in large measure insulated, judicial branch. Moreover, the argument that the Court should allow unrestricted taxpayer or citizen standing underestimates the ability of the representative branches of the Federal Government to respond to the citizen pressure that has been responsible in large measure for the current drift toward expanded standing. Indeed, taxpayer or citizen advocacy, given its potentially broad base, is precisely the type of leverage that in a democracy ought to be employed against the branches that were intended to be responsive to public attitudes about the appropriate operation of government. "We must as judges recall that, as Mr. Justice Holmes wisely observed, the other branches of the Government 'are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' *Missouri, Kansas & Texas R. Co. v. May,* 194 U.S. 267, 270, 48 L. Ed. 971, 24 S. Ct. 638 (1903)." *Flast,* 392 U.S. at 131 (Harlan, J., dissenting).

Id. at 188-89 (footnote omitted).

By expanding the definition of an Article III "Case" or "Controversy," the majority increases federal judicial power at the expense of that of the political branches. I dissent from the majority's unwarranted erosion of the standards for constitutional standing.

APPENDIX B

ANIMAL LEGAL DEFENSE FUND, INC.;
ROSEANN CIRCELLI; MARY EAGAN;
MARC JURNOVE; and AUDREY RAHN, Plaintiffs,
v.
DANIEL GLICKMAN, Secretary of Agriculture;
DR. LONNIE KING, Administrator,
Animal and Plant Health Inspection Service;
and THE UNITED STATES DEPARTMENT OF
AGRICULTURE, Defendants.

Civil Action No. 96-00408

United States District Court
District Of Columbia

MEMORANDUM OPINION
CHARLES R. RICHEY, District Judge

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INTRODUCTION

This action was brought pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, by the Animal Legal Defense Fund ("ALDF") and four individuals, to challenge (1) regulations promulgated by the agency[1] under the Animal Welfare Act ("AWA"), 7 U.S.C. § 2131 *et seq.*; and (2) the agency's abdication of its statutory duties to enforce the AWA.

This Court previously held that the challenged regulations violated both the AWA and the APA. *See Animal Legal Defense Fund, Inc. v. Secretary of Agriculture*, 813 F. Supp. 882 (D.D.C.

[1] The plaintiffs have named the Secretary of Agriculture (the "Secretary"), the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), and the United States Department of Agriculture ("USDA"). The Court shall refer to these defendants collectively as "the defendants" or "the agency."

1993). However, the Court's decision was subsequently vacated when the Court of Appeals for the District of Columbia Circuit ruled that the plaintiffs had not demonstrated that they had standing to pursue their claims. *See Animal Legal Defense Fund, Inc. v. Espy,* 308 U.S. App. D.C. 74, 29 F.3d 720 (D.C. Cir. 1994).

In the present case, the plaintiffs have moved for summary judgment on Counts I-IV of their Amended Complaint. The plaintiffs assert that: (1) the agency's regulation governing the psychological enrichment of primates violates the plain language of the AWA and thus, pursuant to the APA, must be set aside as contrary to law; (2) the agency's failure to set standards for the psychological enrichment of primates constitutes agency action unlawfully withheld and unreasonably delayed in violation of the APA; (3) the agency's failure to issue a regulation promoting the social grouping of primates violates the APA because it is arbitrary and capricious; and (4) the agency's regulation that shields plans from the public violates the Notice and Comment provisions of the APA. The defendants have cross-moved for summary judgment on Counts I-IV.

In Count V of their Amended Complaint, the plaintiffs contend that the agency's practices and policies amount to a complete abdication of its statutory responsibility to enforce the AWA. The plaintiffs rely on this Circuit's *en banc* decision in *Adams v. Richardson,* 156 U.S. App. D.C. 267, 480 F.2d 1159 (D.C. Cir. 1973). With respect to Count V, the plaintiffs assert the need for discovery. The defendants move for dismissal of Count V on the basis that it is a "non-justiciable" claim, that is, that it impermissibly seeks judicial review of matters committed to agency discretion by law under the APA. Furthermore, the defendants have moved for dismissal of Counts I-V on the ground that the plaintiffs lack standing. Finally, the defendants have moved to strike various exhibits filed by the plaintiffs in support of their summary judgment motion on the ground that those exhibits are not a part of the administrative record.

Based on the pleadings, the entire record herein, and the law applicable thereto, and for the reasons expressed below, the Court shall deny the defendants' Motion to Dismiss for lack of standing. The Court shall grant the defendants' Motion to Strike. The Court shall grant summary judgment in favor of the plaintiffs on Counts I-IV of the Complaint and shall grant the defendants'

Motion to Dismiss Count V of the Complaint. Finally, the Court shall remand to the agency for rulemaking proceedings consistent with the following Memorandum Opinion and Order.

BACKGROUND

In 1985, Congress passed the Improved Standards for Laboratory Animals Act, which amended the Animal Welfare Act, 7 U.S.C. §§ 2131-59 ("AWA"), and provides for the humane treatment of animals. Specifically, the AWA now requires the Secretary to "promulgate standards to govern the humane handling, care, treatment and transportation of animals by dealers, research facilities, and exhibitors[2]." 7 U.S.C. § 2143(a)(1). The standards must include "minimum requirements for a physical environment adequate to promote the psychological well-being of primates ([monkeys])." 7 U.S.C. § 2143(a)(2)(B); *see* 7 U.S.C. § 2132(g up to its obligations.).

Subsequent to the passage of the 1985 amendments to the AWA, the agency waited 6 years to publish final regulations. As hereinafter explained, the agency seriously delayed undertaking its responsibilities pursuant to the AWA and, ultimately, failed to live up to its obligations.

Specifically, in response to its mandate from Congress, the agency, on March 7, 1986, published a notice in the *Federal Register* stating its *intent* to promulgate standards and regulations for the care and treatment of animals. AR 1; 51 Fed. Reg. 7950. The Notice solicited information and comments on that proposed rulemaking. On March 15, 1989, the agency finally published a set of proposed rules. AR 568; 54 Fed. Reg. 10897. The agency solicited comments on the proposed rules for 120 days and received a total of 10,686 comments in time for consideration. AR 1368; 55

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[2] The term "exhibitor" means "any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary." 7 U.S.C. § 2132(h).

Fed. Reg. 33448. The number of comments received serves to illustrate the importance of this matter, if nothing else. Rather than respond to these comments, however, the agency instead published a *second* set of proposed rules on August 15, 1990. *Id.* The Secretary received comments until October 1, 1990, at a total of 11,932 comments. AR 1878; 56 Fed. Reg. 6426. Finally, the agency published its regulations on February 15, 1991, which became effective on March 18, 1991. *Id.*

Instead of setting standards, as the AWA directs, the agency's regulation at 9 C.F.R. § 3.81 provides that "Dealers, exhibitors, and research facilities must develop, document, and follow an appropriate plan for environment enhancement adequate to promote the psychological well-being of nonhuman primates . . . in accordance with the currently accepted professional standards as cited in appropriate professional journals or reference guides, and as directed by the attending veterinarian." 7 C.F.R. § 3.81. The regulation does not provide for minimum requirements of social grouping, despite the agency's findings that social grouping promotes primate psychological well-being. Furthermore, the regulation provides that the "plan[s] must be made available to APHIS upon request." *Id.* Thus, the regulation effectively restricts public access to these "plans" by providing that the regulated entities maintain the plans on-site, where the plans would not be subject to Freedom of Information Act requests by members of the public. *See* 5 U.S.C. § 552.

At the outset, the Court shall state the following. This case involves animals, a subject that should be of great importance to all humankind. It also involves the failures of our system of government, another subject of great concern. With respect to Counts I-IV of the Complaint, this case involves an abject failure in the rulemaking process, representative not only of the defendants here, but of many agencies serving under Article II of the Constitution. With respect to Count V, even though it is non-justiciable, it represents the failure of these defendants, like many others in the Executive Branch, to enforce the AWA and its implementing regulations. It also illustrates a failure on the part of Congress to effectively legislate in accordance with the enacting clause of a statute.

> Specifically, the AWA has written into a Congressional statement of policy:

> The Congress finds that . . . the regulation of animals and activities . . . is necessary . . . in order —
>
> (1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;
>
> (2) to assure the humane treatment of animals during transportation in commerce; and
>
> (3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.
>
> The Congress further finds that it is essential to regulate . . . the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose of use.

7 U.S.C. § 2131. Despite this clear statement of purpose, the AWA's enforcement provisions provide that the "Secretary shall make investigations or inspections *as he deems necessary* . . . ." 7 U.S.C. § 2146. Thus, while Congress set forth a clear mandate of humane treatment of animals, it then took away from that mandate by granting unbridled discretion to the agency which, as past experience, will do little or nothing.

The agency's conduct in this and other cases that have come before this member of the Court not only is egregious because of its delayed nature, but represents, in the eyes of at least more than 50,000 members of the plaintiff organization, one of the basic reasons why the American people have lost faith in much of their government. The inaction and eventual failure to act in accordance with law remind the Court of the sage and accurate statement of the late Judge J. Skelly Wright of the Court of Appeals for this Circuit when, in essence, he noted that the regulators in Washington are regulated by the regulated. *See Moss v. Civil Aeronautics Bd.*, 139 U.S. App. D.C. 150, 430 F.2d 891, 893 (D.C. Cir. 1970) (Wright, J.) ("This appeal presents the recurring question which has plagued public regulation of industry: whether the regulatory agency is

unduly oriented toward the interests of the industry it is designed to regulate, rather than the public interest it is designed to protect.").

Furthermore, this case illustrates the need for Congressional reform. All too often, Congress enacts generalized legislation and, thus, passes to an executive agency the responsibility to interpret and fill in gaps that Congress itself could not or would not specifically legislate. Having observed this process for more than 48 years, this Court believes the problem is due in major part to the decline in what was once known as "party responsibility" and also illustrates that Congress, in large measure, is beholden to special interest groups who are unknown to the general public. These groups transfer their efforts from the Legislative Branch to the Executive Branch to effect their goals. Cases like this illustrate their success in achieving delay and inaction.

Were either or both the Legislative and Executive Branches more successful in the lawful exercise of their responsibilities under Articles I and II of the Constitution, it would not be necessary for the Courts to intervene. A. de Tocqueville once observed: "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." 1 A. de Tocqueville, Democracy in America 98, 280 (P. Bradley Knoff ed. 1948). How sad that this is so. Thanks to Article III, however, the Courts remain to provide the last medium of hope for all Americans. The Court will now proceed with its legal analysis of the matters before it for adjudication.

* * *

In Count I of the present Complaint, the individual plaintiffs Roseann Circelli, Mary Eagan, and Marc Jurnove challenge the regulation at 9 C.F.R. § 3.81, which allows regulated entities, such as exhibitors, to develop their own "plans" for the psychological well-being of primates. They claim that this regulation violates the plain language of the AWA at 7 U.S.C. § 2143 and, thus, must be set aside as contrary to law under the APA, 5 U.S.C. § 706(2)(A). Plaints' Opp. at 2. In Count II, these individuals challenge the agency's unreasonable delay in promulgating standards to promote the psychological well-being of primates. They claim this delay constitutes agency action unlawfully withheld and unreasonably delayed in violation of the APA, 5 U.S.C. § 706(1). *Id.* In Count III, these individuals challenge the agency's failure to require the social grouping of

primates as being arbitrary and capricious under the APA, 5 U.S.C. § 706(2)(A). In Count IV, the organizational plaintiff, ALDF, sues on its own behalf and on behalf of its members to remedy the defendants' procedural violations of the APA, 5 U.S.C. § 553(b)(3), in issuing its regulation that requires the regulated entities to keep their "plans" on-site. In Count V, the individual plaintiffs Marc Jurnove and Audrey Rahn challenge the agency's alleged abdication of its statutory responsibilities to enforce the AWA.

The plaintiffs seek, *inter alia*, to declare unlawful and set aside the agency's regulation at 9 C.F.R. § 3.81 and to compel the agency to promulgate standards for a physical environment adequate to promote the psychological well-being and the social grouping of primates. The plaintiffs also seek the appointment of a Special Master to investigate the agency and report to the Court concerning remedial actions that can and should be taken by the agency. The defendants have moved to dismiss on the basis that the plaintiffs lack standing to bring this action and on the basis that Count V is a non-justiciable claim. The parties have filed cross-motions for summary judgment on the merits of Counts I-IV.

DISCUSSION

I. THE COURT SHALL DENY THE DEFENDANTS' MOTION TO DISMISS FOR LACK OF STANDING BECAUSE THE PLAINTIFFS HAVE CONSTITUTIONAL AND STATUTORY STANDING TO CHALLENGE THE AGENCY'S ACTIONS AND OMISSIONS.

For purposes of ruling on a motion to dismiss for lack of standing, this Court must accept as true all material allegations of the complaint, and must construe the complaint in favor of the plaintiffs. *Warth v. Seldin*, 422 U.S. 490, 501, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975). To secure constitutional standing, the plaintiffs must show "injury in fact" that is fairly traceable to the defendants' action and redressable by the relief requested. *Animal Legal Defense Fund, Inc. v. Espy*, 306 U.S. App. D.C. 188, 23 F.3d 496, 498 (D.C. Cir. 1994). "Injury in fact" must amount to the "invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *United States v. Hays*, 132 L. Ed. 2d 635, 115 S. Ct. 2431, 2435 (1995); *see also United States v. SCRAP*, 412 U.S. 669, 689-90 & n.14, 37 L. Ed. 2d 254, 93 S. Ct. 2405 (1973) ("An identifiable trifle is enough for standing to fight out a question of principle."). To secure judicial review under the APA, the plaintiffs must show that the injuries they assert fall within the "zone of interests" of the relevant statute. *Animal Legal Defense Fund*, 23 F.3d at 499. As the party seeking to invoke the Court's jurisdiction, it is a plaintiff's burden clearly to allege facts demonstrating that he or she is a proper party to the suit. *Warth*, 422 U.S. at 518.

The Court concludes, based on the following, that the ALDF lacks representational standing to sue on behalf of its members because it has failed to allege that any of its members would have standing to bring suit on his or her own.[3] The Court concludes, however, that the ALDF has organizational standing to sue on its own behalf. Also, the individual plaintiffs Roseann Circelli, Mary Eagan, Marc Jurnove, and Audrey Rahn, have

[3] The individuals separately listed as plaintiffs in the above-captioned case are not alleged to be members of the plaintiff organization.

standing to sue. The ALDF, as an organization, and each individual plaintiff have alleged injury caused by the defendants' actions or omissions that is remediable by the Court's order and the injury is to an interest within the zone of interests to be protected or regulated by the AWA. *See Action Alliance of Senior Citizens v. Heckler*, 252 U.S. App. D.C. 249, 789 F.2d 931, 936 (D.C. Cir. 1986).

A. The ALDF Lacks Standing To Sue On Behalf Of Its Members.

As in the present case, when an organization seeks standing to litigate, it may do so in two capacities – on its own behalf and on behalf of its members. *American Legal Found. v. Federal Communications Comm'n*, 257 U.S. App. D.C. 189, 808 F.2d 84, 89 (D.C. Cir. 1987). To establish standing on its own behalf (organizational standing), the organization's pleadings must survive the same standing analysis as that applied to an individual. *Id.* To establish standing as an appropriate representative of its members (representational standing), the organization must show that (1) the interests the organization seeks to protect are germane to its organizational purposes; (2) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit; and (3) its members would otherwise have standing to sue in their own right. *United Food & Commercial Workers v. Brown Group, Inc.*, 134 L. Ed. 2d 758, 116 S. Ct. 1529, 1530 (1996) (citing *Warth v. Seldin*, 422 U.S. 490, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975); *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977); and *Automobile Workers v. Brock*, 477 U.S. 274, 91 L. Ed. 2d 228, 106 S. Ct. 2523 (1986)).

Although the Court concludes that the first two requirements of representational standing are met in the present case, the ALDF's claim for representational standing must fail because the ALDF has not alleged that its members, or any one of them, are suffering immediate or threatened injury of the sort that would make out a justiciable case had the members themselves brought suit. *See Warth*, 422 U.S. at 515. In other words, the ALDF has not specifically alleged that any one of its members has suffered or will suffer concrete and imminent injury.

B. The ALDF Has Constitutional and Statutory Standing To Sue In Its Own Capacity With Respect To Count IV.

There is no question that an organization may have standing in its own right to seek judicial relief from injury to itself and to vindicate the rights and immunities itself may enjoy. *Warth*, 422 U.S. at 511. An organization shows "injury in fact" by alleging "concrete and demonstrable injury to the organization's activities." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, 71 L. Ed. 2d 214, 102 S. Ct. 1114 (1982).

The plaintiff ALDF is a national, non-profit corporation organized and existing under the laws of the State of California, having a nationwide membership and constituency of over 50,000 persons who claim to be dedicated to improving the treatment of animals through all legal means. First Am. Compl. ¶ 11. ALDF describes its organizational purposes and activities as including initiating and participating in federal and state legal actions and administrative rulemaking proceedings concerning the humane care and use of all animals; providing information and legal opinions to its members, the general public, and government agencies; advocating the concerns of its members regarding the care and welfare of animals protected under the AWA and any agency act or omission that causes or permits physical pain, behavioral distress, suffering, debilitation, and/or death to animals; ensuring that important governmental decisions affecting the lives and interests of animals are based on a rational analysis and made according to law. *Id.* ¶ 12. The ALDF further describes one of its goals as to improve the living conditions for nonhuman primates, including chimpanzees, who are kept for public display. *Id.* ¶ 13. The ALDF also responds to its members' concerns about the living conditions of nonhuman primates. *Id.* The ALDF claims that the agency's denial of access to exhibitor's plans for primate psychological well-being prohibits the ALDF from learning, and advising its members about 1) the nature of the standards for primate psychological well-being that the agency is authorizing exhibitors to provide their nonhuman primates and 2) whether those standards are being met. *Id.*

The Court of Appeals for this Circuit previously has entertained standing challenges to claims brought by the ALDF when those claims rested on the ALDF's alleged inability to

disseminate information to its members about compliance with the AWA. In *Animal Legal Defense Fund, Inc. v. Espy*, 306 U.S. App. D.C. 188, 23 F.3d 496, 501 (D.C. Cir. 1994) (*"ALDF I"*), and *Animal Legal Defense Fund, Inc. v. Espy*, 308 U.S. App. D.C. 74, 29 F.3d 720, 724 (D.C. Cir. 1994) (*"ALDF II"*), the Court of Appeals held that the ALDF's claim of "informational" injury satisfied the minimum standing requirements of Article III and, thus, that the ALDF had Constitutional standing. Indeed, the agency's action in not accepting the individual plans in order to shield them from the public access provisions of FOIA directly results in injury to the ALDF's informational and counseling activities. *See Havens*, 455 U.S. at 379; *Scientists' Inst. for Public Info. v. Atomic Energy Comm'n*, 156 U.S. App. D.C. 395, 481 F.2d 1079, 1087 n.29 (D.C. Cir. 1973) (organization had standing to challenge Commission's decision not to issue an environmental impact statement because the agency limited the plaintiff's ability to inform the public); *Action Alliance of Senior Citizens v. Heckler*, 252 U.S. App. D.C. 249, 789 F.2d 931, 939 n.9 (D.C. Cir. 1986) (organization had standing to challenge HHS regulation diminishing plaintiff's counseling and advocacy services by improperly limiting flow of information concerning age discrimination). The Court concluded, however, that the ALDF lacked *statutory* standing.

In *ALDF I* and *ALDF II*, the Court of Appeals did not hold that the ALDF failed to show that its claim fell within the "zone of interests" protected by the AWA, but, rather, that the ALDF was *precluded* from so showing because "the general informational and educative interests in animal welfare upon which the organizations base their suit are, by the terms of the Act, the province of a different institution altogether," namely the oversight committees provided for in § 2143(b)(1) of the AWA. *ALDF I*, 23 F.3d at 503; *ALDF II*, 29 F.3d at 724. However, while the AWA establishes committees to oversee *research facilities*, it does not establish the same for *exhibitors*, which are at the focus of the present complaint. Thus, in the present case, there is no statutory impediment to the ALDF's assertion that its claim falls within the AWA's zone of interests.

To meet its burden under the zone of interests test, the ALDF must show "a congressional intent to benefit the organization or some indication that the organization is 'a peculiarly suitable challenger of administrative neglect.'" *ALDF I*, 23 F.3d at 503;

Federation for Am. Immigration Reform, Inc. v. Reno, 320 U.S. App. D.C. 234, 93 F.3d 897, 900 (D.C. Cir. 1996) ("To qualify as [a suitable challenger], a party must show 'less than an intent to benefit but more than a "marginal[] relationship" to the statutory purposes.'") (citations omitted).

The AWA's purpose, *inter alia*, is to provide for the establishment and enforcement of standards to ensure the humane conditions of primates that are kept for public display. The ALDF has, as one of its goals, to improve the living conditions for primates who are kept for public display and to counsel and inform its members and the public about AWA compliance in this regard. It is reasonable to assume, therefore, that an organization such as the ALDF was intended to benefit from the AWA.

Even if it is less than clear that the ALDF is an intended beneficiary of the AWA, however, the ALDF has demonstrated that it is a particularly suitable challenger to administrative neglect on behalf of the agency. ALDF expends valuable organizational resources in its efforts to improve conditions for nonhuman primates kept for public display and to educate and counsel its members and the public about the nature of standards for primate psychological well-being and whether those standards are being met. The ALDF's stake in this litigation is high because the agency's failures to comply with statutory mandate cause a consequent drain on the ALDF's efforts and resources. *See Spann v. Colonial Village, Inc.*, 283 U.S. App. D.C. 216, 899 F.2d 24, 27 (D.C. Cir. 1990).

Furthermore, the ALDF and its members participated in every rulemaking proceeding concerning the 1985 Amendments by timely submitting comments during the 1986, 1987, 1989, and 1990 public comment periods. First Am. Compl. ¶ 14. Its vigorous participation in the regulatory process further demonstrates its stake in the outcome of the instant suit. Based on the foregoing, the Court is convinced that this plaintiff is peculiarly suitable challenger of the agency's alleged actions and omissions here. *See ALDF I*, 23 F.3d at 503.

C. Roseann Circelli, Mary Eagan, and Marc Jurnove Have Constitutional and Statutory Standing To Sue With Respect To Count I-III; Marc Jurnove and Audrey Rahn Have Constitutional And Statutory Standing To Sue With Respect To Count V.

1. The Individual Plaintiffs Have Alleged Injury In Fact.

Circelli, Eagan, and Jurnove challenge, in Counts I-III, the agency's promulgation of 9 C.F.R. § 3.81, the agency's delay in promulgating standards to promote the psychological well-being of primates, and the agency's failure to require the social grouping of primates. Circelli is a 10 year resident of Warren, New Jersey. Throughout her life she has loved animals and been fascinated with, and compassionate towards them. First Am. Compl. ¶ 18. Eagan is a 6-year resident of Holland, Ohio. She also has loved animals all her life. *Id.* ¶ 30. Jurnove is a 45-year resident of New York State. He is a retired mounted park ranger who has had a life-long love for animals, has compassion for their suffering, a desire to ensure that their suffering is reduced and their needs for humane care and protection satisfied. Jurnove was a humane investigator for thirteen years. Since 1980, he has served as a New York State representative of the American Horse Protection Association, specializing in cases of horse abuse and has held a state license as a wildlife rehabilitator. *Id.* ¶ 42.

Circelli, Eagan, and Jurnove each claim to have an aesthetic, recreational, personal, and educational interest in observing, photographing, writing about, learning about, interacting with, and teaching others about wild and exotic animals kept in humane environments. Each also derive aesthetic benefit from seeing these animals treated humanely. Each claim that their aesthetic enjoyment of the animals is impaired, and each claim they experience personal distress, anguish, and sadness when they witness animals in inhumane or harmful conditions. *See* First Am. Compl. at ¶¶ 19, 30, 43.

With respect to Count I-III of the First Amended Complaint, Circelli, Eagan, and Jurnove each alleges that they personally visited an animal exhibition facility and that each personally observed animals, including primates, kept in inhumane

conditions and that each, in fact, suffered extreme aesthetic injury and psychological harm from the experience. *Id.* ¶¶ 21, 32, 49. Each allege that they observed the primates in solitary and barren or dirty cages. *Id.* ¶¶ 21, 32, 48. Circelli, Eagan, and Jurnove each allege that they presently experience anguish and suffering when they recall the experience. *Id.*¶ 27, 32, 58. Furthermore, Circelli alleges that she wishes to return to the facility she visited but is fearful that returning will increase the level of anxiety she already experiences from her previous visit. *Id.* ¶ 26. Eagan also wishes to return, but cannot bear to do so. *Id.* ¶ 33. Jurnove will continue to visit, but cannot do so without continuing to suffer aesthetic and emotional injury. *Id.* ¶ 57.

With respect to Count V of the First Amended Complaint, Jurnove additionally alleges physical and mental distress when he realizes that he is powerless to help the animals he personally witnesses suffering because of the improper implementation and enforcement of the AWA by the defendants, such as their failure to reinspect exhibitors in violation and failure to document violations. *Id.* ¶¶ 58-60. Audrey Rahn, a 13 year resident of Cedar Rapids, Iowa, also claims to have visited an animal exhibitor facility, which she intends to revisit. *Id.* ¶¶ 62-63. During her numerous visits, Rahn's aesthetic enjoyment of the animals was impaired and she experienced physical and mental distress when she witnessed the animals in inhumane conditions and realized that she was powerless to help the animals she witnessed suffering without proper inspection and enforcement of the AWA by the defendants. *Id.* ¶¶ 71-72.

The Court concludes that these individual plaintiffs have indeed alleged injury in fact. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-63, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992) ("The desire to . . . observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purpose of standing."); *Humane Society of the United States v. Hodel*, 268 U.S. App. D.C. 165, 840 F.2d 45, 52 (D.C. Cir. 1988) ("The existence of hunting on wildlife refuges forces Society members to witness animal corpses and environmental degradation, in addition to depleting the supply of animals and birds that refuge visitors seek to view. These are classic aesthetic interest, which have always enjoyed protection under standing analysis."). These allegations of injury constitute far more than a "special interest in the topic" of

animal welfare, which was found to be insufficient to confer standing in *Lujan*, 112 S. Ct. at 2130. They establish that the plaintiffs were personally and directly affected apart from any special interest they share. *See Fund for Animals, Inc. v. Espy*, 814 F. Supp. 142, 149 (D.D.C. 1993) (Oberdorfer, J.) (injuries found to be are distinct from those suffered by the public at large and represented more than a generalized concern for the animals' welfare). *See also Center for Auto Safety v. National Highway Traffic Safety Admin.*, 253 U.S. App. D.C. 336, 793 F.2d 1322, 1337 (D.C. Cir. 1986) ("The courts may appropriately function as the guardians of majority interests, without weakening the separation of powers, when Congress has decided to grant them that role."); *Sierra Club v. Morton*, 405 U.S. 727, 734-35, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972) (the fact that particular interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process).

Each plaintiff alleges that they personally experienced injury from witnessing animals for exhibition kept under inhumane conditions. Each continue to experience aesthetic injuries because of what they witnessed at the facilities they visited. First Am. Compl. ¶ 23, 32, 53, 77-79. Also, each allege that they continue to experience injury because they are forced either to forego future visits or to return to the facilities to visit the animals and be subjected to increased injury due to viewing the animals in inhumane conditions. This injury is concrete and particularized. *See Lujan*, 504 U.S. 555 n.1, 119 L. Ed. 2d 351, 112 S. Ct. 2130 ("By particularized, we mean that the injury must affect the plaintiff in a personal and individual way."). Furthermore, it is imminent as it is on-going and presently occurring.

2. The Injury To The Individual Plaintiffs Is Traceable To The Defendants' Actions Or Omissions.

In order to have standing, the plaintiffs must also allege that the injury or threat they suffer is fairly traceable to the agency action or omission of which they complain. *Duke Power Co. v. Carolina Envt'l Study Group*, 438 U.S. 59, 72, 57 L. Ed. 2d 595, 98 S. Ct. 2620 (1978). The injuries alleged by the individual plaintiffs here are fairly traceable to the defendants' actions and omissions.

Congress has charged the agency with "promulgating standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors." 7 U.S.C. § 2143(a)(1). These include "minimum requirements . . . for a physical environment adequate to promote the psychological well-being of primates." *Id.* § 2143(a)(2)(B). Furthermore, the agency is responsible for enforcing the AWA and its implementing regulations. 7 U.S.C. § 2146. Under such a scheme, Congress, and the Court, assumes that regulated entities act as the agency directs them to act, upon threat of, among other things, losing their license to exhibit animals. Thus, the plaintiffs' alleged injuries in observing animals and primates on public display in inhumane conditions are fairly traceable to the agency's failure to comply with its statutory duties to promulgate appropriate regulations and to enforce the AWA.

Specifically, the injuries to Circelli, Eagan, and Jurnove are fairly traceable to the failure of the agency to promulgate standards for a physical environment adequate to promote the psychological well-being of primates because these plaintiffs claim they suffered injury to their aesthetic interest in viewing nonhuman primates in conditions that did not promote the psychological well-being or social grouping of these animals. Jurnove's and Rahn's injuries are fairly traceable to the defendant's alleged failure to inspect exhibitor facilities and to enforce compliance with the AWA. In this regard, the Court notes that the harm alleged by the plaintiffs here is much more direct than that found sufficient for standing in *SCRAP*, when the Supreme Court found that the plaintiff's members use of natural resources was disturbed by the adverse environmental impact caused by the nonuse of recyclable goods brought about by a rate increase on those commodities. 412 U.S. at 688.

3. The Injury To The Individual Plaintiffs Will Be Redressed By The Relief Sought.

The plaintiffs must show that an injury they have alleged will likely be redressed by the relief requested. *See Larson v. Valente*, 456 U.S. 228, 242, 72 L. Ed. 2d 33, 102 S. Ct. 1673 (1982). A ruling that the defendants have not complied with the Congressional mandate of the AWA, which calls for them to establish and enforce standards for the humane treatment of animals, would meet this test. *See Allen v. Wright*, 468 U.S. 737, 759 & n.24, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (if relief requested is

cessation of allegedly illegal conduct, the redressability analysis is identical to the fairly traceable analysis). The AWA was intended to ensure the humane treatment of animals. Unless the entire statutory scheme is meaningless, the defendants, charged with effectuating the AWA, can accomplish the goals of the Act by acting pursuant to its mandate.

4. The Injury To The Individual Plaintiffs Is Within The Zone Of Interests To Be Protected By The AWA.

The "zone of interests" test requires "some indicia – however slight – that the litigant before the court was intended to be protected, benefited or regulated by the statute under which suit is brought." *Autolog Corp. v. Regan,* 235 U.S. App. D.C. 178, 731 F.2d 25, 29 (D.C. Cir. 1984) (quoting *Copper & Brass Fabricators v. Department of the Treasury,* 220 U.S. App. D.C. 133, 679 F.2d 951, 952 (D.C. Cir. 1982)). Moreover, this Court interprets a statute's zone of interests broadly in recognition that the test originally was intended to expand the number of litigants able to assert their rights in court. 731 F.2d at 29-30.

The Congressional statement of policy for the AWA provides that "the Congress finds . . . that regulation of animals and activities as provided in this chapter is necessary . . . (1) to insure that animals intended . . . for exhibition purposes . . . are provided humane care and treatment." 7 U.S.C. § 2131 (emphasis added). The plaintiffs' aesthetic interest in observing animals on public exhibition in humane conditions clearly falls within the zone of interests of the statute.

The question of standing under the APA depends upon whether the party has alleged such a "personal stake in the outcome of the controversy" that "the dispute sought to be adjudicated will be presented in an adversarial context and in a form historically viewed as capable of judicial resolution." *Sierra Club,* 405 U.S. at 732. The plaintiffs here have amply demonstrated that they have a personal stake in the outcome of this litigation and are zealous adversaries in this cause.

II. THE COURT SHALL GRANT THE DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S EXHIBITS.

In examining the validity of regulations promulgated by an agency, the reviewing court ordinarily considers only those materials before the agency when it made its decision.[4] *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44, 84 L. Ed. 2d 643, 105 S. Ct. 1598 (1985). Exceptions to this general rule have been recognized:

> (1) when agency action is not adequately explained in the record before the court; (2) when the agency failed to consider factors which are relevant to its final decision; (3) when an agency considered evidence which it failed to include in the record; (4) when a case is so complex that a court needs more evidence to enable it to understand the issues clearly; (5) in cases where evidence arising after the agency action shows whether the decision was correct or not; (6) in cases where agencies are sued for a failure to take action; (7) in cases arising under the National Environmental Policy Act; and (8) in cases where relief is at issue, especially at the preliminary injunction stage.

Esch v. Yeutter, 278 U.S. App. D.C. 98, 876 F.2d 976, 991 (D.C. Cir. 1989) (quoting Stark & Wald, *Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action*, 36 Admin. L. Rev. 333, 345 (1984)). The plaintiffs here have, in support of their Motion for Partial Summary Judgment, submitted exhibits external to the administrative record, including videotapes, pictures, inspections reports, enforcement audits, and affidavits. The plaintiffs claim that supplementation of the record here with materials outside the administrative record is appropriate: (1) to show the truth or falsity of the agency's predictions made in support of the regulations at issue; and (2) to show that the agency has failed

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[4] In the present case, the parties have agreed that the Court consider certain sections of the record in making its determination. *See Walter O. Boswell Memorial Hospital v. Heckler*, 242 U.S. App. D.C. 110, 749 F.2d 788 (D.C. Cir. 1984).

to enforce the AWA and has unreasonably delayed execution of the AWA's mandate to promulgate minimum requirements concerning the housing of animals. The Court agrees with the defendants that neither of these arguments support the admission of the plaintiffs' extra-record materials at this stage in the case.

A. The Plaintiffs' Extra-Record Exhibits Will Not Be Admitted Under The "Predictions" Exception In Support Of Their Challenges To The Agency's Regulations.

In *Amoco Oil Co. v. EPA*, 163 U.S. App. D.C. 162, 501 F.2d 722 (D.C. Cir. 1974), the Court of Appeals permitted the consideration of evidence arising after the promulgation of a challenged rule as relevant to the truth or falsity of agency predictions made in support of the rule. 501 F.2d at 729 n.10. This "prediction" exception to the general rule that only the record before the agency is considered has been recognized by other courts; however, it should be construed narrowly. *See Lorion*, 470 U.S. at 744. Cases that have recognized this exception have emphasized that the extra-record evidence must have some alternative indicia of reliability before it will be considered. *Amoco*, 501 F.2d at 729 n.10 (court must "tread cautiously" when considering post-promulgation events because such information "reaches a reviewing court untested by any procedures . . . designed to assure its accuracy and completeness"); *National Assn. of Demolition Contractors, Inc. v. Costle*, 184 U.S. App. D.C. 173, 565 F.2d 748, 752 (D.C. Cir. 1977) (introduction of an extra-record study when the parties agreed that the study's conclusions were undisputed); *American Iron & Steel Inst. v. EPA*, 526 F.2d 1027, 1055 n.61 (3d Cir. 1975) (post-regulation announcements considered when they were reliable and uncontested); *Wisconsin Elec. Power Co. v. Costle*, 715 F.2d 323, 327 (7th Cir. 1983) (supplementation of record not permitted when data "may be accurate in some sense, [but] may also be incomplete"); *Tanners' Council v. Train*, 540 F.2d 1188, 1194 (4th Cir. 1976). Moreover, the "prediction" exception has not been uniformly recognized. *See WEPCO*, 715 F.2d at 327 (rejecting extra-record materials because to accept them would be to take the Court beyond its limited role of APA review and render regulations vulnerable to post hoc attacks and lack of finality); *American Iron*, 526 F.2d at 1077 (Adams, J., concurring) ("To entertain such information may encourage the use of the courts as mere extensions

of a continuous administrative process [which would not] enhance the efficiency of the courts or the confidence of citizens in the fairness of the administrative process.").

Based on the foregoing, the Court does not find it appropriate to consider the extra-record materials under the "predictions" exception. The affidavits and videotapes demonstrating the alleged conditions on the premises of four exhibitors is contested and may present an incomplete picture. The inspection reports and audits similarly are incomplete because they provide information about only four exhibitors out of several thousand facilities under the agency's control. Accordingly, the Court shall not permit the extra-record evidence pursuant to the "predictions" exception.

B. The Plaintiffs' Extra-Record Exhibits Shall Not Be Admitted In Support of Their Agency Action Unreasonably Delayed Claim Or Their Non-enforcement Claim.

With respect to their claim that agency action has been unreasonably delayed, the plaintiffs' claim is based on their contention that the regulations at issue fail to comply with statutory mandate. First Am. Compl. ¶¶ 110-11. The Court sees no reason to look beyond the administrative record to decide this issue. Thus, the Court shall not permit extra-record evidence on this claim.

With respect to the plaintiffs' claim that the defendants have failed to enforce the AWA, neither party has moved for summary judgment on the merits of this claim. The question presented to the Court here is whether the plaintiff's claim is justiciable. Should this claim survive the instant motion to dismiss, the agency has requested the opportunity to compile an administrative record on this issue, which would evidence enforcement efforts undertaken by the agency nationwide. *See* Defs' Reply in Support of Motion to Strike at 8. In the event that administrative record is deemed inadequate, the defendants have suggested that the record be supplemented upon a showing that it is inadequate to permit judicial review. *See id.* (citing *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993)). The Court agrees that because the merits of this Count are not before the Court at this juncture, it shall grant the defendants' Motion to Strike and has considered only the

administrative record for the purposes of this Memorandum Opinion and Order.

III. THE COURT SHALL GRANT THE PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND SHALL DENY THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO COUNTS I-IV.

Under the APA, the "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." 5 U.S.C. § 706(2)(A). The reviewing court shall "compel [agency] action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

A. The Court Shall Enter Judgment In Favor Of The Plaintiffs On Count I; 9 C.F.R. § 3.81 Violates The APA Because It Fails To Set Standards, Including Minimum Requirements, As Mandated By The AWA.

The AWA provides that the agency "*shall promulgate standards* to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors." 7 U.S.C. § 2143(a)(1) (emphasis added). Moreover, those standards "*shall include minimum requirements* . . . for a physical environment adequate to promote the psychological well-being of primates." *Id.* § 2143(a)(2)(B) (emphasis added).

"The court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). The plain meaning of the term "standard" is "that which is set up and established by authority as a rule for the measure of quantity, weight, extent, value, or quality; esp., the original specimen weight or measure sanctioned by government. . . . a definite level, degree, material, character, quality, or the like, viewed as that which is proper and adequate for a given purpose." Webster's New Int'l Dictionary, 2d ed. (unabridged) (1944). "Minimum" is described as "the least quantity or amount assignable, admissible, possible, etc., in a given case." *Id.* A "requirement" is a "requisite or essential condition." *Id.*

The implementing regulation, 9 C.F.R. § 3.81, entitled "environment enhancement to promote psychological well-being," requires that "exhibitors . . . develop, document, and follow an appropriate plan for environment enhancement adequate to promote the psychological well-being of nonhuman primates . . . in accordance with the currently accepted professional standards as cited in appropriate professional journals or reference guides, and as directed by the attending veterinarian." 9 C.F.R. § 3.81. The "plan" must "address" such topics as social grouping and environmental enrichment. *Id.*

The regulation violates the plain language of the AWA because it fails to set standards, including minimum requirements for a physical environment adequate to promote the psychological well-being of primates. Rather, the regulation completely delegates the establishment of such standards to the regulated entities. The complete absence of minimum requirements in the regulation leaves the AWA susceptible to the interpretation of individual regulated entities. At best, the regulation refers these entities to the direction of their attending veterinarians – who are not under the control of the agency. The regulation further makes reference to "committees" established by the AWA; however, as set forth above, those committees are established by the AWA only for research facilities, and not for dealers and exhibitors.

When an agency attempts to give meaning to a statute that is plain on its face, it must give effect to the intent of Congress. *Fertilizer Institute v. EPA,* 290 U.S. App. D.C. 184, 935 F.2d 1303, 1309 (D.C. Cir. 1991). Congress has spoken clearly of the agency's duty, and the agency has failed to fulfill its duty. Accordingly, the Court shall set aside 9 C.F.R. § 3.81 as violative of the APA in that the regulation is contrary to law.

B. The Court Shall Enter Judgment In Favor Of The Plaintiffs On Count II; The Agency's Failure To Promulgate Standards For A Physical Environment Adequate To Promote The Psychological Well-Being Of Primates Constitutes Agency Action Unlawfully Withheld And Unreasonably Delayed In Violation Of The APA.

The APA directs agencies to conclude matters presented to them in a reasonable time and directs reviewing courts to compel agency action unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706(1). A court must review several factors in determining whether there has been unreasonable delay.

> First, the court should ascertain the *length of time* that has elapsed since the agency came under a duty to act, and should evaluate any prospect of early completion.
>
> Next, *the reasonableness of the delay* must be judged in the context of the statute which authorizes the agency's action. This entails an examination of any legislative mandate in the statute and the degree of discretion given the agency by Congress. The Court must also estimate the extent to which delay may be undermining the statutory scheme, either by frustrating the statutory goal or by creating a situation in which the agency is losing its ability to effectively regulate at all.
>
> Third, and perhaps most critically, the court must examine *the consequences of the agency's delay*. The deference traditionally accorded an agency to develop its own schedule is sharply reduced when injury likely will result from avoidable delay . . . Lack of alternative means of eliminating or reducing the hazard necessarily adds to unreasonableness of a delay.
>
> The agency must justify its delay to the court's satisfaction. If the court determined that

> the agency delays in *bad faith*, it should conclude that the delay is unreasonable.

Cutler v. Hayes, 260 U.S. App. D.C. 230, 818 F.2d 879, 897-98 (D.C. Cir. 1987) (emphasis added) (citations, quotations, and footnotes omitted).

The 1985 Amendments to the AWA were enacted on December 23, 1985 and took effect one year after the date of enactment. Nearly 11 years later, the defendants have not yet issued standards to promote a physical environment adequate to promote the psychological well-being of primates pursuant to the AWA. This delay is unreasonable and unjustified. In fact, it is egregious. Moreover, without these standards, the psychological harm to primates that Congress intended to prevent likely is occurring. For these reasons, the agency's delay in issuing standards constitutes agency action unlawfully withheld and unreasonably delayed. The Court shall compel the agency to commence appropriate rulemaking procedures to comply with the directive of 7 U.S.C. § 2143(a)(2)(A).

C. The Court Shall Enter Judgment In Favor Of The Plaintiffs On Count III; The Agency's Failure To Issue A Regulation Promoting The Social Grouping Of Nonhuman Primates Is Arbitrary, Capricious, And An Abuse Of Discretion In Violation Of The APA.

The agency found that primates benefitted from social grouping and that social deprivation resulted in stereotypical behaviors. The agency stated:

> In most cases, we expect group housing to be the most efficient and appropriate method of ensuring that the animals' social needs are met. . . . In general, *housing in groups promotes psychological well-being more assuredly than does individual housing. On the other hand, individual housing has been demonstrated to give rise to significantly more stereotypical behavior than does group housing.*

AR 1924-25; 55 Fed. Reg. 6472-73 (emphasis added). Yet, in the final regulation, the agency delineates only when social

grouping might not be provided. As such, the regulation does not contain any minimum requirement on a point recognized by the agency itself as critical to the psychological well-being of primates.

The agency's proffered explanation notes that situations may arise where it is more harmful than helpful to house animals in groups, such as when animals are incompatible, aggressive, or have a disease. There is ample means to provide for such circumstances in the regulations. As the regulations are written, social grouping is left completely to the exhibitor's interpretation of "currently accepted professional standards" and the exhibitor *may* provide for exceptions in cases where social grouping is undesirable. No explanation is given as to why group housing is not required except in undesirable circumstances. Accordingly, the regulations are arbitrary and capricious under the APA because they do not represent reasoned decisionmaking.

D. The Court Shall Enter Judgment In Favor Of The Plaintiffs On Count IV; The Agency's Regulation Requiring "Plans" To Be Kept On-Site Violated The Notice And Comment Provisions Of The APA.

The APA provides that: "General notice of proposed rulemaking shall be published in the Federal Register . . . [and] shall include . . . either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). The plaintiffs argue that notice was not adequately given during the rulemaking proceeding of the agency's provision in its final rule that requires regulated entities to keep their "plans" on-site. Because notice was not given, the plaintiffs assert that the rule violates the notice and comment provisions of the APA.

A final rule need not be identical to a proposed rule; however, "where [a] change between [a] proposed and final rule is important, the question for the court is whether the final rule is a 'logical outgrowth' of the rulemaking proceeding. If the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal." *American Fed'n of Labor & Cong. of Indus. Org. v. Donovan*, 244 U.S. App. D.C. 255, 757 F.2d 330, 338 (D.C. Cir. 1985) (citations omitted). A determination whether notice was adequate turns on an examination of the notice given and the rule finally adopted. 757

F.2d at 338-39. If there was inadequate notice of a regulation, the regulation is invalid on procedural grounds and the substantive validity of the change need not be examined. *Id.* at 338.

During its rulemaking proceedings, the provisions proposed by the agency stated: "*Dealers, exhibitors, and research facilities must develop, document, and follow a plan* for environmental enhancement adequate to promote the psychological well-being of nonhuman primates. . . . *This plan must be made available to APHIS*, and, in the case of research facilities, to officials of any pertinent funding agency." AR 1463; 55 Fed. Reg. 33525 (emphasis added). The provisions further stated that *records of exemptions from the plan* were to "*be maintained by the dealer, exhibitor, or research facility and [] made available to USDA officials of any pertinent funding Federal agency upon request.*" AR 1464; 55 Fed. Reg. at 33526. The final rule, however, provides that both the plan and any exemptions to the plan are to be made available upon request and, thus, are maintained by the exhibitors on-site. 9 C.F.R. § 3.81.

The agency asserts that the final rule varies in no relevant respect from the proposed provisions, which, in the agency's view, gave reasonable notice that the plans and any exemptions would be kept on-site by the exhibitors. The Court does not agree. The proposed provisions provided that the plans would be *made available* to APHIS, whereas any exemptions to the plans were to be *made available upon request*. Based on the conspicuous omission of the phrase "upon request" with respect to availability of the plans in the proposed provisions, one would reasonably assume that the agency would not have to request the plans from exhibitors and, instead, that the plans would be sent by exhibitors to the agency for inspection.

The defendants argue that because a number of comments interpreted the proposed provision in the manner asserted by the agency here, the Court should conclude that actual notice of the provision's meaning was given. This Circuit's Court of Appeals has held, however, that the agency "must itself provide notice of a regulatory proposal. Having failed to do so, *it cannot bootstrap notice from a comment*. The APA does not require comments to be entered on a public docket. Thus, notice necessarily must come – if at all – from the agency." *American Fed'n*, 757 F.2d at 340 (citing *Small Refiner Lead Phase-Down Task Force v. EPA*, 227 U.S. App.

D.C. 201, 705 F.2d 506, 549 (D.C. Cir. 1983) (emphasis in original)). The agency received 11,932 comments in response to the proposed provisions. AR 1878; 56 Fed. Reg. 6426. That a few comments addressed the physical custody of the plans does not show that actual notice of the plan provision was given.

Neither the proposed provisions nor the information supplemental thereto states that the agency was planning to require regulated entities to keep the plans on-site. In accordance with *American Fed'n*, 757 F.2d at 339, the regulation at 9 C.F.R. § 3.81 must be set aside insofar as it adopted the plan provision in violation of the procedures mandated by the notice and comment provisions of the APA.[5]

IV. THE COURT SHALL GRANT THE DEFENDANTS' MOTION TO DISMISS WITH RESPECT TO COUNT V BECAUSE IT IS A NON-JUSTICIABLE CLAIM.

The plaintiffs seek judicial review of the defendant's alleged failure to enforce the AWA. They claim that the defendants' practice of instructing inspectors not to document violations of the AWA and its failure to inspect facilities constitutes an "abdication of its enforcement responsibilities." First Am. Compl. ¶¶ 122-23. The defendants argue that the Secretary's enforcement of the Act is committed to agency discretion by law, and hence is not subject to judicial review. Unfortunately, because of the language of the AWA, the defendants have managed to evade judicial review.

The APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. In general, agency action is presumptively reviewable. *Lincoln v. Vigil*, 508 U.S. 182, 190, 124 L. Ed. 2d 101, 113 S. Ct. 2024 (1993).

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[5] The agency explained that it was shielding the plans from the public in order to keep the plans from terrorists. In this regard, the plaintiffs suggest that a less restrictive measure could have been adopted. While the Court expresses no opinion regarding the effectiveness of such an alternative, the Court reminds the agency of its "duty to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives." *City of Brookings Mun. Telephone Co. v. FCC*, 262 U.S. App. D.C. 91, 822 F.2d 1153, 1169 (D.C. Cir. 1987) (citation omitted).

Under the APA, however, agency action is not subject to judicial review "to the extent that" such action is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Thus, review is not available in those "rare circumstances where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Lincoln*, 508 U.S. at 191 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830, 84 L. Ed. 2d 714, 105 S. Ct. 1649 (1985)). "In such a case, the statute ('law') can be taken to have 'committed' the decisionmaking to the agency's judgment absolutely." *Id.*; *see also Webster v. Doe*, 486 U.S. 592, 100 L. Ed. 2d 632, 108 S. Ct. 2047 (1988); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971); *Chiles v. United States*, 69 F.3d 1094 (11th Cir. 1995), *cert. denied*, 134 L. Ed. 2d 777, 116 S. Ct. 1674 (1996).

An agency's decision not to institute enforcement proceedings has been considered presumptively unreviewable. *Lincoln*, 508 U.S. at 191; *Chaney*, 470 U.S. at 831; *Safe Energy Coalition of Michigan v. United States Nuclear Regulatory Comm'n*, 275 U.S. App. D.C. 355, 866 F.2d 1473, 1476 (D.C. Cir. 1989). This is because an agency's decision not to institute enforcement proceedings often involves "complicated balancing of a number of factors which are peculiarly within its expertise." *Chaney*, 470 U.S. at 831. The agency "must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Id.*

The agency action here falls within the *Chaney* exception to judicial review. The language of the AWA delegates discretion to the Secretary to "make such investigations or inspections as he deems necessary . . . ." 7 U.S.C. § 2146(a). It does not provide any indication that Congress sought to curb this discretion. It does not impose a duty to make a finding of a violation or to initiate enforcement activities. The statute does not even mandate that the agency penalize a regulated entity found to be in violation. *See* 7 U.S.C. § 2149(c) (penalty "may" be assessed). The language in the AWA provides "no meaningful standard against which to judge the

agency's exercise of discretion," and thus, the Secretary's decision whether to take enforcement action is unsuitable for judicial review. *See Chaney*, 470 U.S. at 830, 834-35.

The plaintiffs argue that, in accordance with this Circuit's decision in *Adams v. Richardson*, 156 U.S. App. D.C. 267, 480 F.2d 1159 (D.C. Cir. 1973) (en banc), judicial review may be had. In *Adams*, an action was brought for declaratory and injunctive relief with respect to the enforcement by the Department of Health, Education and Welfare of the Civil Rights Act. The agency argued that the enforcement of the Act was committed to agency discretion that, therefore, that judicial review was precluded. This Circuit rejected the agency's argument in that case.

The Supreme Court specifically noted the *Adams* decision in *Chaney*. The Court stated that the presumption against reviewability may be rebutted when the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers. *Chaney*, 470 U.S. at 832-33.[6] The Court then cited *Adams* and, although the Court disclaimed any position regarding *Adams'* continued validity, it noted that the *Adams* case involved a "situation where . . . the agency has 'consciously and expressly adopted a general policy' [of non enforcement] that is so extreme as to amount to an abdication of its statutory responsibilities." *Chaney*, 470 U.S. at 832 n.4. Subsequently, this Circuit noted that the statute involved in *Adams*, Title VI of the Civil Rights Act of 1964, contained a "clear and direct statutory mandate." *Cutler v. Hayes*, 260 U.S. App. D.C. 230, 818 F.2d 879, 893 (D.C. Cir. 1987). It expressly required all federal agencies dispensing federal funds to enforce the provisions of Title VI that prohibit racial discrimination in programs accepting such funds. *Id.* In *Adams*, the agency consciously was supplying segregated institutions with federal funds. *Adams*, 480 F.2d at 1163.

The plaintiffs' allegations here do not satisfy the *Chaney/Adams* standard. The plaintiffs allege in Count V that the

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[6] *See also Chaney*, 470 U.S. at 839 (Brennan, J., concurring) (nonenforcement decisions are reviewable where (1) an agency flatly claims that it has no statutory jurisdiction to reach certain conduct; (2) an agency engages in a pattern of non-enforcement of clear statutory language (*Adams*); (3) an agency has refused to enforce a regulation; (4) a nonenforcement decision violates constitutional rights; or (5) possibly when the decision is made for illegitimate reasons (*i.e.*, bribery)).

agency has engaged in a "practice of instructing its inspectors not to document violations of the AWA." First Am. Compl. ¶ 122. However, the plaintiffs complaint demonstrates that the agency does engage in some enforcement actions including investigating and inspecting regulated facilities, documenting violations, citing regulated entities for violations, and instructing the entities regarding actions necessary for compliance. *Id.* ¶¶ 25, 35, 37, 50, 59, 66-68, 70. Furthermore, as noted above, the AWA does not provide the clear statutory mandate involved in the *Adams* case.

Count V of the plaintiffs' Complaint reflects their belief, and the Court's, that the agency should undertake to live up to its obligations to achieve the extremely important goal underlying the AWA – to ensure the humane treatment of animals. Regrettably, the Court is powerless under these circumstances to ensure that the agency will do so. *See Chaney*, 470 U.S. at 839 (Brennan, J., concurring) ("Individual, isolated nonenforcement decisions . . . must be made by hundreds of agencies each day. It is entirely permissible to presume that Congress has not intended courts to review such . . . matters absent Congressional intent to the contrary . . . ."). In this case, Congress enacted language imposing a discretionary duty on the agency to enforce the statute. This is an obvious and deliberate effort not only to hide but to avoid redressability. Any observer of the legislative and administrative process knows that when this kind of language is used, the agency is given a free hand and a shield.

The public can take solace that there is at least some government accountability under the APA and in accordance with the principles of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803), as was seen with respect to Counts I-IV. With respect to Count V, however, because of its oath to uphold the law, this Court must, under *Chaney*, allow the agency to escape its wrath.

CONCLUSION

For the reasons detailed above, the Court shall deny the defendants' Motion to Dismiss for lack of standing. The Court shall grant the defendants' Motion to Strike. The Court shall grant summary judgment in favor of the plaintiffs on Counts I-IV of the Complaint and shall grant the defendants' Motion to Dismiss Count V of the Complaint. The Court shall remand this case to the agency

for rulemaking proceedings in accordance with the foregoing. Finally, the Court shall enter an Order of even date herewith, consistent with the foregoing Memorandum Opinion.

ORDER

For the reasons set forth in the Court's Memorandum Opinion of even date herewith, it is, by the Court, this 29th day of October, 1996,

ORDERED that the defendants' Motion to Dismiss for lack of standing shall be, and hereby is, DENIED; and it is

FURTHER ORDERED that the defendants' Motion to Strike shall be, and hereby is, GRANTED; and it is

FURTHER ORDERED that final judgment shall be, and hereby is, entered for the plaintiffs on Counts I-IV of the Complaint; and it is

FURTHER ORDERED that the regulation at 9 C.F.R. § 3.81 shall be, and hereby is, set aside as invalid; and it is

FURTHER ORDERED that this matter shall be, and hereby is, remanded to the agency with respect to Count II with directions to promulgate new regulations that establish standards including minimum requirements for a physical environment adequate to promote the psychological well-being of primates, in accordance with the AWA and the APA, subject to notice and comment, without delay and in accordance with the Opinion of the Court on this date; and it is

FURTHER ORDERED that Count V of the Complaint shall be, and hereby is, DISMISSED; and it is

FURTHER ORDERED that any and all other extant motions shall be, and hereby are, declared MOOT; and it is

FURTHER ORDERED that the above-captioned case shall be, and hereby is, dismissed, without prejudice, from the dockets of this Court with the understanding that the plaintiffs may make oral application to the Deputy Clerk of the Court, Ms. Debra White, at

(202) 273-0553, to re-open the same in the event that the defendants do not act with all deliberate speed in accordance with this Court's Order and Opinion of even date herewith.

ANIMAL LEGAL DEFENSE FUND, INC., et al., Appellees

v.

Daniel R. GLICKMAN, Secretary, United States Department of Agriculture, et al., Appellants

National Association for Biomedical Research, Intervenor-Appellant

Nos. 97-5009, 97-5031 and 97-5074.

United States Court of Appeals, District of Columbia Circuit

Argued Sept. 12, 1997.
Decided Dec. 9, 1997.

SENTELLE, Circuit Judge:

An animal welfare group and four individuals sued the United States Department of Agriculture and some of its officials (collectively, "USDA" or "the Department") under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.* (1988). These plaintiffs argued that a USDA regulation concerning the treatment of primates failed to comply with the requirements of the governing statute, the Animal Welfare Act ("AWA" or "the Act"), and asked the district court to set the regulation aside. After concluding that the plaintiffs had standing to sue, the district court entered judgment invalidating the challenged regulation and ordered USDA to promulgate a new regulation in compliance with the Act. *See Animal Legal Defense Fund, Inc. v. Glickman,* 943 F. Supp. 44 (D.D.C.1996). USDA appealed

After reviewing the record, we conclude that all of the plaintiffs (now appellees) lack constitutional standing to pursue their claims. Accordingly, we vacate the judgment of the district court and remand with instructions to dismiss the case for want of jurisdiction.

I.

This appeal is but the latest chapter in the ongoing saga of Animal Legal Defense Fund, Inc.'s ("ALDF") effort to enlist the courts in its campaign to influence USDA's administration of the Animal Welfare Act, 7 U.S.C. § 2131 *et seq*. Congress enacted the Act in 1966 to ensure the humane care and treatment of various animals used in research or for exhibition or kept as pets. 7 U.S.C. § 2131. Pursuant to a 1985 amendment, the Act requires the Secretary of USDA ("Secretary") to "promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors." 7 U.S.C. § 2143(a)(1). Such standards must include "minimum requirements . . . for a physical environment adequate to promote the psychological well-being of primates." 7 U.S.C. § 2143(a)(2)(B).

In 1991, pursuant to section 2143(a), the Secretary promulgated rules on the handling, care and treatment of primates. *See* 9 C.F.R. § 3.75 *et seq*. The rule at issue in this appeal requires regulated entities to "develop, document, and follow an appropriate plan for environment enhancement adequate to promote the psychological well-being of nonhuman primates." 9 C.F.R. § 3.81. According to that rule, such a plan "must be in accordance with the currently accepted professional standards as cited in appropriate professional journals or reference guides, and as directed by the attending veterinarian," and must address several specified topics, including "[s]ocial grouping" and "[e]nvironmental enrichment." *Id.*

In 1991, ALDF, along with three individuals and two other organizations, filed a lawsuit challenging several USDA regulations promulgated under the AWA, including section 3.81. The plaintiffs' principal argument was that, by permitting the regulated entities to develop their own environmental enhancement plans, the regulations failed to include "minimum requirements" as mandated by the AWA, *see* 7 U.S.C. § 2143(a)(2), and instead impermissibly delegated promulgation of these requirements to the regulated entities. The district court ruled for the plaintiffs, and set aside the challenged regulations. *See Animal Legal Defense Fund v. Secretary of Agriculture*, 813 F.Supp. 882 (D.D.C.1993). We reversed, holding that all of the plaintiffs lacked standing to

challenge the regulations. *Animal Legal Defense Fund, Inc. v. Espy*, 29 F.3d 720, 722 (D.C.Cir.1994) ("ALDF II").[1]

ALDF mounted a second challenge to section 3.81 in 1996. This time, it was joined by a different group of individual co-plaintiffs: Roseann Circelli, Mary Eagan, Marc Jurnove, and Audrey Rahn. Ruling on the plaintiffs' motion for summary judgment, the district court again invalidated section 3.81, and ordered the Secretary to promulgate a new regulation in compliance with the "minimum requirements" mandate of the AWA.

II.

Under Article III of the Constitution, the "judicial power" of the United States is restricted to the resolution of "cases" and "controversies." U.S. CONST. art. III, § 2, cl. 1. In order to limit the docket of federal courts to "disputes . . . which are traditionally thought to be capable of resolution through the judicial process" and to restrict federal courts "to a role consistent with a system of separated powers," *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982) (quoting *Flast v. Cohen*, 392 U.S. 83, 97, 88 S.Ct. 1942, 1951, 20 L.Ed.2d 947 (1968)) (internal quotation marks omitted), our Article III jurisprudence has identified a cluster of doctrines, " 'standing[,] mootness, ripeness, political question, and the like,' by which we test the fitness of controversies for judicial resolution." *Louisiana Environmental Action Network v. Browner*, 87 F.3d 1379, 1382 (D.C.Cir.1996) (quoting *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984)) (additional citations and internal punctuation omitted).

In furtherance of the limitations of Article III, the standing doctrine requires would-be federal litigants to demonstrate an (1) injury in fact; (2) which is caused by, or is fairly traceable to, the alleged unlawful conduct; and (3) which is likely to be redressed by a favorable decision of the court. *Valley Forge*, 454 U.S. at 471-72, 102 S.Ct. at 757-59; *see also Bennett v. Spear*, 520 U.S. 154, ___, 117 S.Ct. 1154, 1161, 137 L.Ed.2d 281 (1997); *Lujan v. Defenders*

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[1] We shall refer to this case as *ALDF II* to distinguish it from an earlier case with the same name, which involved a challenge to a different USDA regulation. *See Animal Legal Defense Fund, Inc. v. Espy*, 23 F.3d 496 (D.C.Cir.1994) ("*ALDF I*").

of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136-37, 119 L.Ed.2d 351 (1992). The party invoking federal jurisdiction bears the burden of establishing these elements, *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231, 110 S.Ct. 596, 607-08, 107 L.Ed.2d 603 (1990), and may not pursue its claims before the federal judiciary if it fails to demonstrate any one of them. *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 662-63 (D.C.Cir.1996) (*in banc*). Neither the individual appellees nor the Animal Legal Defense Fund have successfully borne that burden. We consider first the individual appellees Circelli, Jurnove and Eagan.[2] We assume their factual allegations to be true for purposes of this appeal. *See Defenders of Wildlife*, 504 U.S. at 561, 112 S.Ct. at 2136-37.

A.

Roseann Circelli, Marc Jurnove and Mary Eagan have viewed primates housed in isolation at local zoos. Circelli saw an orangutan who could neither see nor hear other primates, and who sat quietly by himself in a corner. Circelli Affidavit ¶ 8. Jurnove saw a large male chimpanzee who was kept in isolation from other primates, and whose hands and feet were covered with scars and cuts. Jurnove Affidavit ¶ 8. Eagan has seen primates housed in isolation as well, "including one baby baboon and another primate named Charlie." Eagan Affidavit ¶ 4. These appellees, all of whom enjoy visiting animals in captivity, say they have suffered aesthetic and recreational injuries resulting from their observation of these primates. Under some circumstances, interference with the observation and study of animals may constitute injury in fact for standing purposes.[3] *Humane Soc'y of the U.S. v. Babbitt*, 46 F.3d 93, 97 (D.C.Cir.1995). It is not apparent, however, that these appellees have met their burden of demonstrating a cognizable injury in fact. "[G]eneral emotional 'harm,' no matter how deeply felt, cannot suffice for injury-in-fact for standing purposes." *Id.* at

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[2] The district court did not rule that plaintiff Audrey Rahn had standing to challenge section 3.81. *See Animal Legal Defense Fund, Inc.*, 943 F.Supp. at 54-57. Thus, we shall not address her claims here.

[3] As our dissenting colleague acknowledges, *see* Dissent at 473 n.1, all of the Supreme Court cases recognizing such an injury have done so when the challenged conduct threatens to diminish the overall supply of an animal species available for observation or study. Since this case does not involve allegations of such conduct, none of the cases cited by the dissent compels the conclusion that the individual appellees have articulated a cognizable constitutional injury.

98. It is part of the price of living in society, perhaps especially in a free society, that an individual will observe conduct that he or she dislikes. "[T]he psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under Art. III. . . ." *Valley Forge*, 454 U.S. at 485, 102 S.Ct. at 765. Even assuming that appellees have suffered sufficient injury, we conclude that they nonetheless lack constitutional standing because their claimed injuries are not "fairly traceable" to the Secretary's alleged failure to promulgate "minimum requirements" as mandated by the AWA, and because such injuries are not likely to be redressed by the relief sought in this case. *See Defenders of Wildlife*, 504 U.S. at 560-61, 112 S.Ct. at 2136-37; *Florida Audubon Soc'y*, 94 F.3d at 663-64.

B.

In analyzing the "causation" element of constitutional standing, we ask whether it is "substantially probable" that the challenged acts of the defendant – as opposed to the acts of an independent third party – caused a plaintiff's particularized injury. *Florida Audubon Soc'y*, 94 F.3d at 663 (citations omitted). Our "redressability" inquiry asks whether the relief sought by a plaintiff is likely to alleviate the plaintiff's injury. *Id.* at 663-64. Causation, then, focuses on whether a particular party is appropriately before the court; redressability focuses on whether the court is the appropriate forum for the parties' dispute. *Id.* at 664.

When a plaintiff asserts injuries attributed to " 'the government's allegedly unlawful regulation (or lack of regulation) of *someone else*,' " the causation and redressability elements of standing analysis "require more exacting scrutiny." *Freedom Republicans, Inc. v. Federal Election Comm'n*, 13 F.3d 412, 416 (D.C.Cir.1994) (Wald, J.) (emphasis in original) (quoting *Defenders of Wildlife*, 504 U.S. at 562, 112 S.Ct. at 2137). Under these circumstances, standing is not necessarily precluded, but the "indirectness of injury 'may make it substantially more difficult to meet the minimum requirements of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm.' " *Id.* (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 44-45, 96 S.Ct. 1917, 1927-28, 48 L.Ed.2d 450 (1976)). A plaintiff who claims to have been injured by the government's regulation of a third party must "adduce facts showing that the unfettered choices

made by independent actors have been or will be made in such manner as to produce causation and permit redressability of injury." *Id.* at 417 (quoting *Defenders of Wildlife*, 504 U.S. at 562, 112 S.Ct. at 2137) (internal quotation marks and brackets omitted).

In this case, the zoos at which the primates were housed acted independently; no laws or regulations compelled them to keep the primates in the conditions witnessed by appellees. Granted, when the government takes action that has a "determinative or coercive effect" on a third party, the government may be said to have "caused" injuries which are directly attributable to the third party. *Bennett*, 520 U.S. at ___, 117 S.Ct. at 1164. But we are aware of no cases – and appellees have provided us with none – in which the government was said to have *caused* a constitutional injury by failing to issue regulations that would have forbidden third parties from engaging in conduct that caused a plaintiff's injury. The attenuated connection between appellees' claimed injuries and the government's alleged failure to promulgate "minimum requirements" does not present a sufficient " 'causal nexus between the agency action and the asserted injury' " to establish causation. *Humane Soc'y*, 46 F.3d at 100 (quoting *Freedom Republicans*, 13 F.3d at 418).

Our dissenting colleague is convinced that Jurnove's affidavit establishes standing because it alleges that the inhumane conditions at the Long Island Game Farm are *permitted* by USDA regulations. Dissent at 474. We disagree, first of all, that a regulation which permits third parties to engage in offensive behavior, but does not require them to do so, may fairly be said to cause an injury resulting from the behavior of the third parties; such a regulation would not have the "determinative or coercive effect" on the third parties which would render the alleged injuries fairly traceable to governmental action. *See Bennett*, 520 U.S. at ___, 117 S.Ct. at 1164.

Furthermore, we disagree with the dissent's interpretation of Jurnove's affidavit. To be sure, as the dissent emphasizes, the affidavit states that USDA inspectors found the Long Island Game Farm to be in compliance with existing regulations on several occasions. *See* Dissent at 474-75. However, the gravamen of Jurnove's affidavit is that USDA failed to enforce existing regulations, not that the offensive behavior was permitted by them. Jurnove states this conclusion explicitly: he says that the USDA

inspection report finding the Game Farm to be "in compliance with all standards" was "incorrect," Jurnove Affidavit ¶¶ 18-19, and adds that "[he] knew [that the appalling conditions in which the animals were housed] violated the minimum requirements of the Animal Welfare Act." *Id.* ¶ 17. The dissent ignores these allegations, which we are bound to accept as true. *See Defenders of Wildlife*, 504 U.S. at 561, 112 S.Ct. at 2136-37.

We turn now to redressability. Our conclusion that appellees' alleged injuries are not "fairly traceable" to the Secretary's actions leads us to the related conclusion that appellees' injuries are not likely to be redressed by compelling the Secretary to promulgate new regulations. *See National Wildlife Fed'n v. Hodel*, 839 F.2d 694, 705 (D.C.Cir.1988) ("causation" and "redressability" tend to merge in cases where plaintiffs seek cessation of allegedly illegal conduct). Appellees have not shown that it is "likely" that the relief they want (compelling the Secretary to promulgate new regulations) will alleviate their claimed aesthetic and recreational injuries. *See Florida Audubon Soc'y*, 94 F.3d at 663-64. In any event, appellees were not entirely clear as to how any such alleviation would be accomplished. For example, our review of their affidavits reveals that all of the appellees claim to suffer persisting, painful memories of animal mistreatment. *See* Jurnove Affidavit ¶ 43 ("I continue to think about [the animals I have witnessed at the Long Island Game Farm], and experience the assault on my senses from remembering their plight."); Circelli Affidavit ¶ 17 ("I continue to think about the animals I observed at the Scotch Plains Zoo in May, 1995, and I continue to be haunted by the horrible conditions in which I saw them living."); Eagan Affidavit ¶ 4 ("I . . . continue to carry the memories of these inhumanely treated animals with me every day, which depresses me and causes me distress."). Appellees do not claim, much less demonstrate, that their painful memories are likely to be obliterated by compelling the Secretary to promulgate new legal regulations.

Appellees' claims of redressability are further undercut, given that the district court, whether directly or through appellants, has no power to compel the exhibitors to continue maintaining primates at all, let alone in a manner aesthetically pleasing to appellees. By way of comparison, in *Fulani v. Brady*, 935 F.2d 1324 (D.C.Cir.1991), we rejected the claimed standing of a would-be competitor in the presidential debates who challenged the tax-

exempt status of the sponsoring organization. We did so noting that if we ordered the Treasury to revoke that status, the sponsoring committee might decline to hold the debates at all, a possibility that would not enable the plaintiff to participate as she sought. *Id.* at 1329. Similarly, if a court ordered the Department to issue different regulations concerning primates, for all we know, the exhibitors might cease keeping primates.

We hold that appellees Jurnove, Circelli and Eagan have failed to carry their burden of alleging facts that would demonstrate that the choices of the animal exhibitors "have been or will be made in such manner as to produce causation and permit redressability of injury." *Defenders of Wildlife*, 504 U.S. at 562, 112 S.Ct. at 2137. Thus, these appellees lack constitutional standing to raise their claims, and we lack power to resolve them.

III.

Having determined that the individual appellees have no standing to bring the present action, we must consider the standing of the Animal Legal Defense Fund. Organizational plaintiffs may assert standing of two sorts. First, an organization may have standing on its own behalf when its rights and immunities as an entity have suffered recognizable injury, redressable in the action at bar. Second, "under proper conditions," it may "sue on behalf of its members asserting the members' individual rights." *Common Cause v. Federal Election Comm'n*, 108 F.3d 413, 417 (D.C.Cir.1997) (citing *Warth v. Seldin*, 422 U.S. 490, 511, 95 S.Ct. 2197, 2211-12, 45 L.Ed.2d 343 (1975)). Either way, an organizational plaintiff still must meet the constitutional standing requirements set forth above.

In the present action, ALDF claims standing for injury to its own rights, rather than standing derived from its members. Its claimed injury is an alleged violation of its procedural rights in USDA's adoption of section 3.81 governing the "plans" for psychological enrichment of primates. Under the final version of the rule, the regulated keepers of primates need not file such plans with USDA, where they would be subject to disclosure under the Freedom of Information Act, 5 U.S.C. § 552, but only must maintain such plans on their own premises, making them available to USDA "upon request." ALDF, noting that the "upon request" language appeared for the first time in the final rule, complains that neither it nor any other party had the opportunity to submit

comments on the language to USDA before its adoption. ALDF argues that the Secretary's failure to provide public notice of the "upon request" language constitutes a violation of the notice and comment procedures of the Administrative Procedure Act. *See* 5 U.S.C. § 553. According to ALDF, this violation gave rise to a purely procedural injury: the inability to participate in rulemaking as provided by the APA. Indeed, ALDF specifically disclaims any informational injury resulting from a violation of the Animal Welfare Act; it insists instead that its injury "is caused by the agency's violation of the APA."

Both we and the Supreme Court have had recent occasion to analyze the standing requirements applicable to an assertion of procedural injury. We concluded that "a plaintiff may have standing to challenge the failure of an agency to abide by a procedural requirement only if that requirement was 'designed to protect some threatened concrete interest' of the plaintiff." *Florida Audubon Soc'y*, 94 F.3d at 664 (quoting *Defenders of Wildlife*, 504 U.S. at 573 n. 8, 112 S.Ct. at 2143 n. 8). Therefore, "[t]he mere violation of a procedural requirement . . . does not permit any and all persons to sue to enforce the requirement." *Id.* Rather, a party claiming to be injured by a procedural violation must show that the violation is likely to harm the party in a specific and individualized way. *Id.*; *see also Defenders of Wildlife*, 504 U.S. at 573 n. 8, 112 S.Ct. at 2143 n. 8 (holding that a plaintiff may enforce procedural rights "so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing").

Here, ALDF claims that the Secretary has failed to comply with the notice and comment procedures of the APA. This abstract, generalized "injury" is not sufficient to afford standing. ALDF may have been deprived of the opportunity to submit comments on the "upon request" language of section 3.81. But this predicament is shared by many others, indeed by the world at large. ALDF has failed to make the case that it has suffered a concrete injury as distinguished from the abstract procedural right to submit comments to USDA. Its articulated "injury" amounts to no more than a " 'general interest [in the alleged procedural violation] common to all members of the public.' " *Florida Audubon Soc'y*, 94 F.3d at 664 (quoting *Ex Parte Levitt*, 302 U.S. 633, 634, 58 S.Ct. 1

(1937)). Thus, it lacks constitutional standing to pursue the asserted violation in federal court.

IV.

We conclude that none of the appellees have standing to challenge section 3.81. Accordingly, we vacate the judgment of the district court, and remand the case with directions to dismiss for want of jurisdiction.

There are two additional appeals before us: (1) ALDF's appeal of the district court's order permitting the National Association of Biomedical Research ("NABR") to intervene in the case for purposes of appealing the district court's invalidation of section 3.81; and (2) NABR's appeal from the ruling of the district court that invalidated section 3.81. Given our decision to vacate the judgment of the district court, we order these separate appeals dismissed as moot.

WALD, Circuit Judge, dissenting:

I find that Marc Jurnove's uncontested affidavit is more than sufficient to meet both the constitutional and the prudential requirements of standing in this case. Hence, I will highlight Mr. Jurnove's claims, without passing on those of the other individual plaintiffs or ALDF. In my view, Mr. Jurnove's affidavit amply illustrates how far the majority opinion has strayed from a reasonable interpretation of standing requirements under Supreme Court and our circuit's law.

I. BACKGROUND

The 1985 amendments to the Animal Welfare Act ("AWA") direct the Secretary of Agriculture to "promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors." Pub.L. No. 99-198, § 1752, 99 Stat. 1354, 1645 (1985) (codified at 7 U.S.C. § 2143(a) (1994)). They further provide that such standards "shall include minimum requirements" for, *inter alia*, "a physical environment adequate to promote the psychological well-being of primates." *Id.* Pursuant to this authority, the United States Department of Agriculture ("USDA") issued regulations for primate dealers, exhibitors, and research facilities that included a small number of mandatory requirements

and also required the regulated parties to "develop, document, and follow an appropriate plan for environment enhancement adequate to promote the psychological well-being of nonhuman primates. This plan must be in accordance with the currently accepted professional standards as cited in appropriate professional journals or reference guides, and as directed by the attending veterinarian." 9 C.F.R. § 3.81 (1997). Although these plans must be made available to the USDA, the regulated parties are not obligated to make them available to members of the public. *See id.*; *infra* at 474-75.

For his entire adult life, Mr. Jurnove has "been employed and/or worked as a volunteer for various human and animal relief and rescue organizations." Jurnove Affidavit ¶ 3. "By virtue of [his] training in wildlife rehabilitation and [his] experience in investigating complaints about the treatment of wildlife, [he is] very familiar with the needs of and proper treatment of wildlife." *Id.* ¶ 6. "Because of [his] familiarity with and love of exotic animals, as well as for recreational and educational purposes and because [he] appreciate[s] these animals' beauty, [he] enjoy[s] seeing them in various zoos and other parks near [his] home." *Id.* ¶ 7.

Between May 1995 and June 1996, when he filed his affidavit, Mr. Jurnove visited the Long Island Game Farm Park and Zoo ("Game Farm") at least nine times. Throughout this period, and since as far back as 1992, USDA has not questioned the adequacy of this facility's plan for the psychological well-being of primates.

Mr. Jurnove's first visit to the Game Farm, in May 1995, lasted approximately six hours. While there, Mr. Jurnove saw many animals living under conditions that caused him deep distress. For instance, the Game Farm housed one primate, a Japanese Snow Macaque, in a cage lacking both a solid floor and any kind of heating device. Mr. Jurnove reports that he saw this monkey "shivering," "huddled up with her head tucked in and arms hugging herself." *Id.* ¶ 14. The Game Farm also placed adult bears next to squirrel monkeys, although Jurnove immediately saw evidence that the arrangement made the monkeys frightened and extremely agitated.

The day after this visit, Mr. Jurnove began to contact government agencies, including USDA, in order to secure help for

these animals. Based on Mr. Jurnove's complaint, USDA inspected the Game Farm on May 3, 1995. According to Mr. Jurnove's uncontested affidavit, however, the agency's resulting inspection report "states that [the USDA inspectors] found the facility in compliance with all the standards." *Id.* ¶ 18. Mr. Jurnove returned to the Game Farm on eight more occasions because these urportedly legal conditions left him gravely concerned.

On July 17, 18, and 19, 1995, he observed "virtually the same conditions" that allegedly caused him aesthetic injury during his first visit to the Game Farm in May. *Id.* ¶ 20. This time, Mr. Jurnove documented these conditions with photographs and sent them to USDA. Nevertheless, the responding USDA inspectors found only a few violations at the Game Farm; they reported nothing about many of the conditions that concerned Mr. Jurnove and that he had told the agency about.

Mr. Jurnove, however, remained unflagging in his determination to rectify conditions at the Game Farm that USDA had now twice concluded were legal. He devoted two trips in August and one in September to "videotaping the conditions that the inspection missed," and on each trip he found that the troubling conditions persisted. *Id.* ¶¶ 22-28. The Japanese snow monkey, for instance, still had no comfortable place to sit; her only cushion against the wire mesh of her cage was a small rag that one visitor had apparently thrown to her. At the end of September, USDA sent three inspectors to the Game Farm in response to Mr. Jurnove's continued complaints and reportage; they found violations, however, only with regard to the facility's fencing.

Mr. Jurnove returned to the Game Farm once more on October 1, 1995. Indeed, he only stopped his frequent visits and thorough surveys when he became ill and required major surgery. After his health returned, Mr. Jurnove visited the Game Farm in April 1996, hoping to see improvements in the conditions that he had repeatedly brought to USDA's attention. He was disappointed again; "the animals [were] in literally the same conditions as [he] had seen them over the summer of 1995." *Id.* ¶ 33; *see also id.* ¶ 35 ("The Japanese Snow Monkey had no access to a feeding station. No play toys were in her cage. She just sat huddled and shivering violently with head tucked in. She was doing the same thing she had done last April to deal with the cold and the fact she was not provided a heat lamp."). Mr. Jurnove's resulting complaints

prompted USDA to inspect the Game Park in late May 1996. For the fourth time, the agency found the facility largely in compliance, with a few exceptions. In June 1996, Mr. Jurnove filed the affidavit that is the basis of his claim here. He concluded this affidavit by stating his intent to "return to the Farm in the next several weeks" and to "continue visiting the Farm to see the animals there." *Id.* ¶ 43.

II. ANALYSIS

To my mind, Mr. Jurnove has more than met the requirements for standing. First, his allegations solidly establish injury in fact. As the majority acknowledges, *see* Majority opinion ("Maj. op.") at 468, the Supreme Court has repeatedly made clear that injury to an aesthetic interest in the observation of animals is sufficient to satisfy the demands of Article III standing. In *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986), for instance, the Court found that the plaintiffs had "undoubtedly . . . alleged a sufficient 'injury in fact' in that the whale watching and studying of their members will be adversely affected by continued whale harvesting," *id.* at 230 n. 4, 106 S.Ct. at 2866, n. 4 (citing *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972); *United States v. SCRAP*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973)); *see also Sierra Club*, 405 U.S. at 734, 92 S.Ct. at 1366 ("Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process."). *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), reiterated that "the desire to use *or observe* an animal species, *even for purely esthetic purposes*, is undeniably a cognizable interest for purpose of standing," *id.* at 562-63, 112 S.Ct. at 2137-38 (emphasis added). This statement precisely describes Mr. Jurnove's claim. Contrary to the majority's suggestion, *see* Maj. op. at 468, Mr. Jurnove has not only alleged "general emotional 'harm' " stemming from the observation of conduct with which he disagrees, *Humane Soc'y v. Babbitt*, 46 F.3d 93, 98 (D.C.Cir.1995). Rather, Mr. Jurnove's affidavit describes in great detail how conditions at the Game Farm directly impair his well-established and lifelong aesthetic interest in observing, studying, and enjoying animals by

preventing him from seeing these animals in a humane environment.

This court's precedent specifically recognizes that people have a significant interest in observing animals living under humane conditions. In *Animal Welfare Institute v. Kreps*, 561 F.2d 1002 (D.C.Cir.1977), the plaintiff organizations alleged, *inter alia*, an interest in "enjoy[ing] Cape fur seals alive in their natural habitat under conditions in which the animals are not subject to . . . inhumane treatment," *id.* at 1007. This court held that these plaintiffs' aesthetic interests satisfied the requirements of standing. *See id.* Similarly, *Humane Society v. Hodel*, 840 F.2d 45 (D.C.Cir.1988), found standing based on a complaint "that the existence of hunting on wildlife refuges forces Society members to witness animal corpses and environmental degradation, in addition to depleting the supply of animals and birds that refuge visitors seek to view," *id.* at 52; *see also Animal Legal Defense Fund, Inc. v. Espy* (*ALDF I*), 23 F.3d 496, 505 (D.C.Cir.1994) (Williams, J., concurring in part and dissenting in part) ("Our own cases have indicated a recognition of people's interest in seeing animals free from inhumane treatment.").[4]

The majority also finds that Mr. Jurnove has not satisfied the causation and redressibility prongs of Article III standing. It contends, first, that Mr. Jurnove has failed to establish causation because he has not adequately established that the Game Farm's treatment of its animals is causally linked to the actions (or inactions) of the USDA. This argument is false. As the Supreme Court necessarily recognized in *Japan Whaling Association*, plaintiffs claiming aesthetic injury (there, injury to plaintiffs'

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[4] I do not think it dispositive that the Supreme Court cases that have thus far recognized standing based on an aesthetic interest in the observation or study of animals have all involved challenged conduct that allegedly threatened to diminish the overall supply of an animal species available for observation or study. *See Lujan*, 504 U.S. at 562, 112 S.Ct. at 2137; *Japan Whaling Ass'n*, 478 U.S. at 230 n 4, 106 S.Ct. at 2866, n. 4; *see also* Maj. op. at 468 n.3. I cannot believe that constitutional standing actually turns on the difference between an observer's aesthetic injury from government action that threatens to wipe out an animal species altogether and government action that leaves some of the animals in a persistent state of suffering, which in all probability eventually will insure their demise. Indeed, the latter seems capable of causing more serious aesthetic injury in many instances.

interest in whale watching) can establish standing based on the government's failure to adequately regulate a third party (there, the government's failure to certify that the Japanese whaling industry was exceeding its quota under international law). *See* 478 U.S. at 230 n. 4, 106 S.Ct. at 2866, n. 4. What is required in a case where "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*" is that the plaintiff "adduce facts showing that those choices [by the third party] have been or will be made in such manner as to produce causation and permit redressibility of injury." *Lujan*, 504 U.S. at 562, 112 S.Ct. at 2137. I believe that Mr. Jurnove has met this test.

As Mr. Jurnove's affidavit makes clear, the Game Farm has repeatedly submitted to inspection by the USDA. The allegedly inhumane conditions at the Game Farm have persisted precisely because the USDA inspectors have always concluded on the basis of these visits that these conditions comply with USDA regulations; it is entirely reasonable to presume that if the USDA had found the Game Farm out of compliance with current regulations, or if the governing regulations had themselves been more stringent, the Game Farm's owners would have acted to remain in accord with the law, either by altering their practices or by going out of business and transferring their animals to exhibitors willing to operate legally (two scenarios that would do more to protect Mr. Jurnove's aesthetic interest in observing animals living under humane conditions than the current situation). *See id.* at 585, 112 S.Ct. at 2149 (Stevens, J., concurring) ("We must presume that if this Court holds that § 7(a)(2) requires consultation, all affected agencies would abide by that interpretation and engage in the requisite consultations."). Instead, however, USDA has not questioned the legality of the Game Farm's plan since 1992. Since May 1995, when Mr. Jurnove began visiting the Game Farm and complaining to the agency, USDA inspectors have examined, and largely approved, the actual conditions at the facility at least four times. USDA's first inspection report "states that [the USDA inspectors] found the facility in compliance with all the standards." Jurnove Affidavit ¶ 18. Although subsequent inspection reports identify a few conditions that Mr. Jurnove agrees violate USDA regulations, USDA continued – in at least three more inspection reports – to conclude that the Game Farm was in compliance with existing USDA regulations in all other respects, including presumably the existence of a plan that met the regulations' standards. As the majority notes,

see Maj. op. at 475, Mr. Jurnove alleges in his affidavit that USDA has failed to enforce even its own existing regulations. However, Mr. Jurnove's affidavit is not limited to this allegation. Instead, he additionally alleges that the conditions at the Game Farm, conditions that USDA inspectors repeatedly concluded comply with existing USDA regulations, violate "the minimum requirements" of *the governing statute* – the Animal Welfare Act. Jurnove Affidavit ¶ 17.

Asking Mr. Jurnove to show more than this as a constitutional prerequisite to standing places him in a Catch-22. One reason ALDF is dissatisfied with USDA's implementation of the 1985 amendments to the Animal Welfare Act is that USDA's present regulations do not require regulated entities to give a copy of their plans to the agency, where they would be subject to Freedom of Information Act requests. *See* 9 C.F.R. § 3.81 (1997); *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 151-52, 100 S.Ct. 960, 969, 63 L.Ed.2d 267 (1980) (finding that "FOIA is only directed at requiring agencies to disclose those 'agency records' for which they have chosen to retain possession or control"). This oversight structure means that Mr. Jurnove has no access to the Game Farm's plan, no way to determine whether the facility is following it, and no means to discover whether the plan itself conforms to current USDA regulations. *See* Oral Argument (statement of government counsel) (confirming that the Game Farm's owners are not obligated to show their plans to the plaintiffs)[5]; Oral Argument (statement of ALDF counsel) (reporting that plaintiffs have not been able to see any exhibitor plans).[6] Under the regulatory regime that USDA created,

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[5] The oral argument proceeded as follows:

Q. Correct me if I'm not mistaken: It's pretty hard for the plaintiffs or Mr. Jurnove to know what's in the plan because it isn't accessible to them. Is that correct?

A. Yes, your honor.

Q. I mean, can they go to the Long Island Zoo, the farm, and say I want to see your plan?

A. Well, they can try. I don't think the exhibitors have any obligation.

Q. But the exhibitor doesn't have to make it available to him under the regulations.

[6] The oral argument proceeded as follows:

Q. Have you ever, did. . . . At any point in this lawsuit, you didn't ever see any of these plans, did you?

A. No, your honor. We're not allowed to see them. That's the other thing. These are secret plans. This is secret law to the nth degree, your honor. These are, these

Continued

and that Mr. Jurnove challenges, all he can do is rely on USDA's repeated determinations that the Game Farm is operating legally. In my view, that is all a reasonable interpretation of causation can demand of him.

The majority's discussion of redressibility, in turn, mischaracterizes Mr. Jurnove's claims. Mr. Jurnove's alleged injuries are not limited to "persisting, painful memories of animal mistreatment." Maj. op. at 469. Rather, Mr. Jurnove also alleges that he has a current routine of regularly visiting the Game Farm and provides a limited time period within which he will make his next visit, stating that he plans to "return to the Farm in the next several weeks" and to "continue visiting the Farm to see the animals there." Jurnove Affidavit ¶ 43. More stringent regulations, that prohibit the inhumane conditions that have consistently caused Mr. Jurnove aesthetic injury in the past, will necessarily improve his aesthetic experience during his planned, future trips to the Game Farm. If one makes the assumption, which I think one should, that the Game Farm's owners will abide by the law, then tougher regulations will either allow Mr. Jurnove to visit a more humane Game Farm or (if the Game Farm's owners decide to close rather than comply with higher legal standards), to visit the animals he has come to know in their new homes within exhibitions that comply with the more exacting regulations.

In addition to satisfying the three constitutional requirements for standing, Mr. Jurnove also falls within the zone of interests protected under the AWA's provisions on animal exhibitions:

> "[I]n cases where the plaintiff is not itself the subject of the contested regulatory action, the [zone of interests] test denies a right of review if the plaintiff's interests are so *marginally related* to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be especially

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plans are taking the place of the minimum requirements that Congress directed the Secretary to promulgate, yet the public doesn't even get to see what those minimum requirements are because their plans are, by deliberate action of the agency, are kept at the facility and thereby kept from public disclosure.

> demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff."

Akins v. Federal Election Comm'n, 101 F.3d 731, 739 (D.C.Cir.1996) (*en banc*) (quoting *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399-400, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987)), *cert. granted*, ____ U.S. ____, 117 S.Ct. 2451, 138 L.Ed.2d 210 (1997); *see also ALDF I*, 23 F.3d at 502 ("The [zone of interests] test precludes review of administrative action if the particular interest asserted is 'so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.' " (quoting *Clarke*, 479 U.S. at 399, 107 S.Ct. at 750)); *Autolog Corp. v. Regan*, 731 F.2d 25, 29-30 (D.C.Cir.1984) ("[T]he zone of interests test requires some indicia – however slight – that the litigant before the court was intended to be protected, benefitted or regulated by the statute under which suit is brought. Courts should give broad compass to a statute's zone of interests in recognition that this test was originally intended to *expand* the number of litigants able to assert their rights in court.") (citations and internal quotation marks omitted). In this case, logic, legislative history, and the structure of the AWA all indicate that Mr. Jurnove's injury satisfies the zone of interests test. The very purpose of animal exhibitions is, necessarily, to entertain and educate people; exhibitions make no sense unless one takes the interests of their human visitors into account. The legislative history of the 1985 amendments to the Animal Welfare Act confirms that Congress acted with the public's interests in mind. In introducing these amendments, Senator Robert Dole explained "that we need to ensure the public that adequate safeguards are in place to prevent unnecessary abuses to animals, and that everything possible is being done to decrease the pain of animals during experimentation and testing." 131 CONG. REC. 29,155 (1985) (statement of Sen. Dole). Moreover, while the AWA establishes oversight committees with private citizen members for research facilities, *see* 7 U.S.C. § 2143(b)(1) (1994), it creates no counterpart for animal exhibitions, leaving the representation of the public interest wholly to individuals like Mr. Jurnove. Mr. Jurnove, a regular viewer of animal exhibitions regulated under the AWA, clearly falls within the zone of interests the statute protects.

III. CONCLUSION

Twenty-five years ago, Justice Douglas argued in dissent that "[t]he critical question of 'standing' [in environmental cases] would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers." *Sierra Club*, 405 U.S. at 741, 92 S.Ct. at 1369 (Douglas, J., dissenting). This case hardly requires us to recognize the independent standing of animals; Mr. Jurnove's allegations fall well within the requirements of our existing precedent. But it is striking, particularly in a world in which animals cannot sue on their own behalf, how far the majority opinion goes toward making governmental action that regulates the lives of animals, and determines the experience of people who view them in exhibitions, unchallengeable. *See* Oral Argument (statement of government counsel) (voicing his inability to identify one party who would have standing to challenge the USDA regulations implementing the AWA provisions on animal exhibitions).[7] Because such a result

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[7] The oral argument proceeded as follows:

Q. Can you conceive of a situation where, can you envision, or could you enlighten us on whether you think there could ever be a situation under this Act where any kind of a plaintiff could make a necessary showing?

A. Your honor, we wouldn't absolutely rule it out. But, we do believe. . . .

Q. No, no. But I can't even, I can't conceptualize it myself. I thought you might help me, if your arguments here are valid ones.

A. Again, we are really only dealing with the parties, and the facts, and the circumstances of this case.

Q. Well, I know.

A. We can't rule out the possibility there would be a plaintiff. Q. But you can't, you can't. . . .

Q. (second judge) If the answer is no, you might want to say no.

Q. (back to original questioner) Yeah, yeah, yeah. But you can't think of it; I can't think of it. I don't know that that destroys your argument, I just thought there might be some extra element that you could identify that was, you know, missing here. Somebody says I go to the zoo, the highlight of my week, I go to the zoo every Saturday afternoon at two o'clock. And I know they have a plan on file, and I know that the USDA said the plan is adequate. But when I go there, there are these animals crying, and all alone, and lying in their feces, and all the other kinds of things there. That's not adequate? I'm just trying to figure out can anything ever be adequate? I guess the answer is no. I mean the answer that I can think of. . . .

A. Probably not. Probably not, your honor.

Continued

offends the compassionate purposes of the statute, and our precedents do not require it, I respectfully dissent.

Q. So what you're saying is Congress just never meant there to be anything except the official enforcement mechanism?
A. Yes, your honor.

APPENDIX C

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 97-5009 September Term, 1997
96cv00408

Animal Legal Defense Fund, Inc., et al.,
Appellees

v.

National Association For Biomedical Research,

Appellant

Consolidated with 97-5031, 97-5074

BEFORE: Wald, Sentelle and Henderson, Circuit Judges

ORDER

Upon consideration of appellees' petition for rehearing filed January 23, 1997, and of the responses thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Robert A. Bonner
Deputy Clerk

Circuit Judge Wald would grant the petition.

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 97-5009 September Term, 1997
96cv00408

Animal Legal Defense Fund, Inc., et al.,
Appellees

v.

National Association For Biomedical Research,
Appellant

Consolidated with 97-5031, 97-5074

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellees' Suggestion For Rehearing In Banc, the responses thereto, and the vote by a majority of the judges of the court in regular active service in favor of the suggestion, it is

ORDERED that the suggestion be granted. These cases will be reheard by the court sitting in banc. The judgment filed herein on December 9, 19978 is hereby vacated.
It is

FURTHER CONSIDERED that an order governing further proceedings will issue separately.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 97-5009 September Term, 1997
96cv00408

Animal Legal Defense Fund, Inc., et al.,
Appellees

v.

National Association For Biomedical Research,
Appellant

Consolidated with 97-5031, 97-5074

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

It is ORDERED, by the Court in banc, on its own motion, that oral argument will be heard at 9:30 A.M. on Wednesday, May 13, 1998. The only issue to be considered is whether the allegations in the complaint and the affidavit of Marc Jurnove are sufficient to allow Jurnove to meet Article III standing requirements.

The parties are directed to file thirty copies each of the briefs and joint appendix previously filed with the court and to do so on or before April 8, 1998.

The parties are granted leave to file supplemental briefs not in excess of ten pages discussing any pertinent authorities handed down since the date of this court's decision provided that any such briefs are received at the court no later than 4 P.M. on April 8, 1998.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Robert A. Bonner
Deputy Clerk

APPENDIX D

UNITED STATES CODE ANNOTATED TITLE 7. AGRICULTURE CHAPTER 54 – TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

§ 2143. Standards and certification process for humane handling, care, treatment and transportation of animals

(a) Promulgation of standards, rules, regulations, and orders; requirements; research facilities; State authority

(1) The Secretary shall promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors.

(2) The standards described in paragraph (1) shall include minimum requirements –

(A) for handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care, and separation by species where the Secretary finds necessary for humane handling, care, or treatment of animals; and

(B) for exercise of dogs, as determined by an attending veterinarian in accordance with general standards promulgated by the Secretary, and for a physical environment adequate to promote the psychological well-being of primates.

(3) In addition to the requirements under paragraph (2), the standards described in paragraph (1) shall, with respect to animals in research facilities, include requirements –

(A) for animal care, treatment, and practices in experimental procedures to ensure that animal pain and distress are minimized, including

adequate veterinary care with the appropriate use of anesthetic, analgesic, tranquilizing drugs, or euthanasia;

(B) that the principal investigator considers alternatives to any procedure likely to produce pain to or distress in an experimental animal;

(C) in any practice which could cause pain to animals –

(i) that a doctor of veterinary medicine is consulted in the planning of such procedures;

(ii) for the use of tranquilizers, analgesics, and anesthetics;

(iii) for pre-surgical and post-surgical care by laboratory workers, in accordance with established veterinary medical and nursing procedures;

(iv) against the use of paralytics without anesthesia; and

(v) that the withholding of tranquilizers, anesthesia, analgesia, or euthanasia when scientifically necessary shall continue for only the necessary period of time;

(D) that no animal is used in more than one major operative experiment from which it is allowed to recover except in cases of –

(i) scientific necessity; or

(ii) other special circumstances as determined by the Secretary; and

(E) that exceptions to such standards may be made only when specified by research protocol and

that any such exception shall be detailed and explained in a report outlined under paragraph (7) and filed with the Institutional Animal Committee.

(4) The Secretary shall also promulgate standards to govern the transportation in commerce, and the handling, care, and treatment in connection therewith, by intermediate handlers, air carriers, or other carriers, of animals consigned by any dealer, research facility, exhibitor, operator of an auction sale, or other person, or any department, agency, or instrumentality of the United States or of any State or local government, for transportation in commerce. The Secretary shall have authority to promulgate such rules and regulations as he determines necessary to assure humane treatment of animals in the course of their transportation in commerce including requirements such as those with respect to containers, feed, water, rest, ventilation, temperature, and handling.

(5) In promulgating and enforcing standards established pursuant to this section, the Secretary is authorized and directed to consult experts, including outside consultants where indicated.

(6)(A) Nothing in this chapter –

(i) except as provided in paragraph [ ] (7) of this subsection, shall be construed as authorizing the Secretary to promulgate rules, regulations, or orders with regard to the design, outlines, or guidelines of actual research or experimentation by a research facility as determined by such research facility;

(ii) except as provided [in] subparagraphs (A) and (C)(ii) through (v) of paragraph (3) and paragraph (7) of this subsection, shall be construed as authorizing the Secretary to promulgate rules, regulations, or orders with regard to the performance of actual research or

experimentation by a research facility as determined by such research facility; and

(iii) shall authorize the Secretary, during inspection, to interrupt the conduct of actual research or experimentation.

(B) No rule, regulation, order, or part of this chapter shall be construed to require a research facility to disclose publicly or to the Institutional Animal Committee during its inspection, trade secrets or commercial or financial information which is privileged or confidential.

(7)(A) The Secretary shall require each research facility to show upon inspection, and to report at least annually, that the provisions of this chapter are being followed and that professionally acceptable standards governing the care, treatment, and use of animals are being followed by the research facility during actual research or experimentation.

(B) In complying with subparagraph (A), such research facilities shall provide –

(i) information on procedures likely to produce pain or distress in any animal and assurances demonstrating that the principal investigator considered alternatives to those procedures;

(ii) assurances satisfactory to the Secretary that such facility is adhering to the standards described in this section; and

(iii) an explanation for any deviation from the standards promulgated under this section.

(8) Paragraph (1) shall not prohibit any State (or a political subdivision of such State) from promulgating standards in

addition to those standards promulgated by the Secretary under paragraph (1).

(b) Research facility Committee; establishment, membership, functions, etc.

(1) The Secretary shall require that each research facility establish at least one Committee. Each Committee shall be appointed by the chief executive officer of each such research facility and shall be composed of not fewer than three members. Such members shall possess sufficient ability to assess animal care, treatment, and practices in experimental research as determined by the needs of the research facility and shall represent society's concerns regarding the welfare of animal subjects used at such facility. Of the members of the Committee –

(A) at least one member shall be a doctor of veterinary medicine;

(B) at least one member –

(i) shall not be affiliated in any way with such facility other than as a member of the Committee;

(ii) shall not be a member of the immediate family of a person who is affiliated with such facility; and

(iii) is intended to provide representation for general community interests in the proper care and treatment of animals; and

(C) in those cases where the Committee consists of more than three members, not more than three members shall be from the same administrative unit of such facility.

(2) A quorum shall be required for all formal actions of the Committee, including inspections under paragraph (3).

(3) The Committee shall inspect at least semiannually all animal study areas and animal facilities of such research facility and review as part of the inspection –

(A) practices involving pain to animals, and

(B) the condition of animals, to ensure compliance with the provisions of this chapter to minimize pain and distress to animals. Exceptions to the requirement of inspection of such study areas may be made by the Secretary if animals are studied in their natural environment and the study area is prohibitive to easy access.

(4)(A) The Committee shall file an inspection certification report of each inspection at the research facility. Such report shall –

(i) be signed by a majority of the Committee members involved in the inspection;

(ii) include reports of any violation of the standards promulgated, or assurances required, by the Secretary, including any deficient conditions of animal care or treatment, any deviations of research practices from originally approved proposals that adversely affect animal welfare, any notification to the facility regarding such conditions, and any corrections made thereafter;

(iii) include any minority views of the Committee; and

(iv) include any other information pertinent to the activities of the Committee.

(B) Such report shall remain on file for at least three years at the research facility and shall be available for inspection by the Animal and

Plant Health Inspection Service and any funding Federal agency.

(C) In order to give the research facility an opportunity to correct any deficiencies or deviations discovered by reason of paragraph (3), the Committee shall notify the administrative representative of the research facility of any deficiencies or deviations from the provisions of this chapter. If, after notification and an opportunity for correction, such deficiencies or deviations remain uncorrected, the Committee shall notify (in writing) the Animal and Plant Health Inspection Service and the funding Federal agency of such deficiencies or deviations.

(5) The inspection results shall be available to Department of Agriculture inspectors for review during inspections. Department of Agriculture inspectors shall forward any Committee inspection records which include reports of uncorrected deficiencies or deviations to the Animal and Plant Health Inspection Service and any funding Federal agency of the project with respect to which such uncorrected deficiencies and deviations occurred.

(c) Federal research facilities; establishment, composition, and responsibilities of Federal Committee

In the case of Federal research facilities, a Federal Committee shall be established and shall have the same composition and responsibilities provided in subsection (b) of this section, except that the Federal Committee shall report deficiencies or deviations to the head of the Federal agency conducting the research rather than to the Animal and Plant Health Inspection Service. The head of the Federal agency conducting the research shall be responsible for –

(1) all corrective action to be taken at the facility; and

(2) the granting of all exceptions to inspection protocol.

(d) Training of scientists, animal technicians, and other personnel involved with animal care and treatment at research facilities

Each research facility shall provide for the training of scientists, animal technicians, and other personnel involved with animal care and treatment in such facility as required by the Secretary. Such training shall include instruction on –

(1) the humane practice of animal maintenance and experimentation;

(2) research or testing methods that minimize or eliminate the use of animals or limit animal pain or distress;

(3) utilization of the information service at the National Agricultural Library, established under subsection (e) of this section; and

(4) methods whereby deficiencies in animal care and treatment should be reported.

(e) Establishment of information service at National Agricultural Library; service functions

The Secretary shall establish an information service at the National Agricultural Library. Such service shall, in cooperation with the National Library of Medicine, provide information –

(1) pertinent to employee training;

(2) which could prevent unintended duplication of animal experimentation as determined by the needs of the research facility; and

(3) on improved methods of animal experimentation, including methods which could –

(A) reduce or replace animal use; and

(B) minimize pain and distress to animals, such as anesthetic and analgesic procedures.

(f) Suspension or revocation of Federal support for research projects; prerequisites; appeal procedure

In any case in which a Federal agency funding a research project determines that conditions of animal care, treatment, or practice in a particular project have not been in compliance with standards promulgated under this chapter, despite notification by the Secretary or such Federal agency to the research facility and an opportunity for correction, such agency shall suspend or revoke Federal support for the project. Any research facility losing Federal support as a result of actions taken under the preceding sentence shall have the right of appeal as provided in sections 701 through 706 of Title 5.

(f) Veterinary certificate; contents; exceptions[1]

No dogs or cats, or additional kinds or classes of animals designated by regulation of the Secretary, shall be delivered by any dealer, research facility, exhibitor, operator of an auction sale, or department, agency, or instrumentality of the United States or of any State or local government, to any intermediate handler or carrier for transportation in commerce, or received by any such handler or carrier for such transportation from any such person, department, agency, or instrumentality, unless the animal is accompanied by a certificate issued by a veterinarian licensed to practice veterinary medicine, certifying that he inspected the animal on a specified date, which shall not be more than ten days before such delivery, and, when so inspected, the animal appeared free of any infectious disease or physical abnormality which would endanger the animal or animals or other animals or endanger public health: Provided, however, That the Secretary may by regulation provide exceptions to this certification requirement, under such conditions as he may prescribe in the regulations, for animals shipped to research facilities for purposes of research, testing or experimentation requiring animals not eligible for such certification. Such

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[1] [There are two section (f)s.]

certificates received by the intermediate handlers and the carriers shall be retained by them, as provided by regulations of the Secretary, in accordance with section 2140 of this title.

(g) Age of animals delivered to registered research facilities; power of Secretary to designate additional classes of animals and age limits

No dogs or cats, or additional kinds or classes of animals designated by regulation of the Secretary, shall be delivered by any person to any intermediate handler or carrier for transportation in commerce except to registered research facilities if they are less than such age as the Secretary may by regulation prescribe. The Secretary shall designate additional kinds and classes of animals and may prescribe different ages for particular kinds or classes of dogs, cats, or designated animals, for the purposes of this section, when he determines that such action is necessary or adequate to assure their humane treatment in connection with their transportation in commerce.

(h) Prohibition of C.O.D. arrangements for transportation of animals in commerce; exceptions

No intermediate handler or carrier involved in the transportation of any animal in commerce shall participate in any arrangement or engage in any practice under which the cost of such animal or the cost of the transportation of such animal is to be paid and collected upon delivery of the animal to the consignee, unless the consignor guarantees in writing the payment of transportation charges for any animal not claimed within a period of 48 hours after notice to the consignee of arrival of the animal, including, where necessary, both the return transportation charges and an amount sufficient to reimburse the carrier for all out-of-pocket expenses incurred for the care, feeding, and storage of such animals.

CODE OF FEDERAL REGULATIONS
TITLE 9 – ANIMALS AND ANIMAL PRODUCTS
CHAPTER I – ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE
SUBCHAPTER A – ANIMAL WELFARE
PART 3 – STANDARDS
SUBPART D – SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF NONHUMAN PRIMATES[1] FACILITIES AND OPERATING STANDARDS

§ 3.81 Environment enhancement to promote psychological well-being.

Dealers, exhibitors, and research facilities must develop, document, and follow an appropriate plan for environment enhancement adequate to promote the psychological well-being of nonhuman primates. The plan must be in accordance with the currently accepted professional standards as cited in appropriate professional journals or reference guides, and as directed by the attending veterinarian. This plan must be made available to APHIS upon request, and, in the case of research facilities, to officials of any pertinent funding agency. The plan, at a minimum, must address each of the following:

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[1] Nonhuman primates include a great diversity of forms, ranging from the marmoset weighing only a few ounces, to the adult gorilla weighing hundreds of pounds, and include more than 240 species. They come from Asia, Africa, and Central and South America, and they live in different habitats in nature. Some have been transported to the United States from their natural habitats and some have been raised in captivity in the United States. Their nutritional and activity requirements differ, as do their social and environmental requirements. As a result, the conditions appropriate for one species do not necessarily apply to another. Accordingly, these minimum specifications must be applied in accordance with the customary and generally accepted professional and husbandry practices considered appropriate for each species, and necessary to promote their psychological well-being.

These minimum standards apply only to live nonhuman primates, unless stated otherwise.

(a) Social grouping. The environment enhancement plan must include specific provisions to address the social needs of nonhuman primates of species known to exist in social groups in nature. Such specific provisions must be in accordance with currently accepted professional standards, as cited in appropriate professional journals or reference guides, and as directed by the attending veterinarian. The plan may provide for the following exceptions:

(1) If a nonhuman primate exhibits vicious or overly aggressive behavior, or is debilitated as a result of age or other conditions (e.g., arthritis), it should be housed separately;

(2) Nonhuman primates that have or are suspected of having a contagious disease must be isolated from healthy animals in the colony as directed by the attending veterinarian. When an entire group or room of nonhuman primates is known to have or believed to be exposed to an infectious agent, the group may be kept intact during the process of diagnosis, treatment, and control.

(3) Nonhuman primates may not be housed with other species of primates or animals unless they are compatible, do not prevent access to food, water, or shelter by individual animals, and are not known to be hazardous to the health and well-being of each other. Compatibility of nonhuman primates must be determined in accordance with generally accepted professional practices and actual observations, as directed by the attending veterinarian, to ensure that the nonhuman primates are in fact compatible. Individually housed nonhuman primates must be able to see and hear nonhuman primates of their own or compatible species unless the attending veterinarian determines that it would endanger their health, safety, or well-being.

(b) Environmental enrichment. The physical environment in the primary enclosures must be enriched by providing means of expressing noninjurious species-typical activities. Species differences should be considered when determining the type or methods of enrichment. Examples of environmental enrichments include providing perches, swings, mirrors, and other increased cage complexities; providing objects to manipulate; varied food items; using foraging or task-oriented feeding methods; and providing interaction with the care giver or other familiar and knowledgeable person consistent with personnel safety precautions.

(c) Special considerations. Certain nonhuman primates must be provided special attention regarding enhancement of their environment, based on the needs of the individual species and in accordance with the instructions of the attending veterinarian. Nonhuman primates requiring special attention are the following:

(1) Infants and young juveniles;

(2) Those that show signs of being in psychological distress through behavior or appearance;

(3) Those used in research for which the Committee-approved protocol requires restricted activity;

(4) Individually housed nonhuman primates that are unable to see and hear nonhuman primates of their own or compatible species; and

(5) Great apes weighing over 110 lbs. (50 kg). Dealers, exhibitors, and research facilities must include in the environment enhancement plan special provisions for great apes weighing over 110 lbs. (50 kg), including additional opportunities to express species-typical behavior.

(d) Restraint devices. Nonhuman primates must not be maintained in restraint devices unless required for health reasons as determined by the attending veterinarian or by a research proposal approved by the Committee at research facilities. Maintenance under such restraint must be for the shortest period possible. In instances where long-term (more than 12 hours) restraint is required, the nonhuman primate must be provided the opportunity daily for unrestrained activity for at least one continuous hour during the period of restraint, unless continuous restraint is required by the research proposal approved by the Committee at research facilities.

(e) Exemptions.

(1) The attending veterinarian may exempt an individual nonhuman primate from participation in the environment enhancement plan because of its health or condition, or in consideration of its well-being. The basis of the exemption must be recorded by the attending veterinarian for each exempted nonhuman primate. Unless the basis for the exemption is a permanent condition, the exemption must be reviewed at least every 30 days by the attending veterinarian.

(2) For a research facility, the Committee may exempt an individual nonhuman primate from participation in some or all of the otherwise required environment enhancement plans for scientific reasons set forth in the research proposal. The basis of the exemption shall be documented in the approved proposal and must be reviewed at appropriate intervals as determined by the Committee, but not less than annually.

(3) Records of any exemptions must be maintained by the dealer, exhibitor, or research facility and must be made available to USDA officials or officials of any pertinent funding Federal agency upon request.

Supreme Court, U.S.
FILED
MAR 1 1999
OFFICE OF THE CLERK

No. 98-1059

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

NATIONAL ASSOCIATION FOR BIOMEDICAL RESEARCH,

Petitioner,

v.

ANIMAL LEGAL DEFENSE FUND, INC., *et al.*,

Respondents.

On Petition For Writ of Certiorari to the
United States Court of Appeals
For the District of Columbia Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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March 1, 1999

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QUESTION PRESENTED

Whether the Court of Appeals for the D.C. Circuit correctly ruled that a person who derives aesthetic enjoyment from viewing primates but who witnesses them in barren environments and in isolation from other primates has standing to challenge an agency regulation that fails to promote the psychological well-being of primates when the agency is mandated by the Animal Welfare Act to promulgate such regulations.

RULE 29.6 LISTING

Respondent Animal Legal Defense Fund is a nonprofit corporation qualified for tax exempt status under 26 U.S.C. § 501(c)(3). It has no parent companies and no nonwholly owned subsidiaries.

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Respondents Animal Legal Defense Fund ("ALDF"), Marc Jurnove, Mary Eagan and Roseanne Circelli oppose the petition for a writ of certiorari that was filed by the intervenor National Association for Biomedical Research ("NABR"). NABR intervened after the District Court entered judgment for plaintiffs on both standing and the merits, and its intervention is currently subject to a cross-appeal pending in the D.C. Circuit.

NABR's petition does not set forth all of the facts pertinent to the Court's consideration of whether *certiorari* should be granted and it misrepresents certain other critical facts. In addition, NABR has not satisfied any of the criteria under which this Court grants review of appellate decisions. Accordingly, respondents will first set forth their counterstatement of the case and then explain why the Court should not grant review.

COUNTERSTATEMENT

The issue decided by the court of appeals was whether an individual has standing to challenge under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, a regulation issued by the United States Department of Agriculture ("USDA") pursuant to the Animal Welfare Act ("AWA"), 7 U.S.C. §§ 2131 et seq. The AWA governs the handling and care of animals that are held in captivity for exhibition, experimentation and sale. In 1985, Congress amended the AWA to provide that the USDA "shall promulgate standards to govern the humane handling, care, treatment, and transportation of animals," and that such standards "shall include minimum requirements . . . for a physical environment adequate to promote the psychological well-being of primates," 7 U.S.C. §2143(a)(2)(B).

Despite USDA's specific determination that it *could* promulgate standards that would promote the psychological well-being of primates, 56 Fed. Reg. 6426, 6474 (1991) (emphasis supplied), the final regulation USDA promulgated left the establishment of such standards to the very entities whose inadequate handling of this matter led Congress to require that the *agency* promulgate such standards. In addition, although the agency had determined that "non-human primates . . . require contact with other nonhuman primates for their psychological well-being," and that "social deprivation is regarded by the scientific community as psychologically debilitating to social animals," 54 Fed. Reg. 10822, 10917 (March 15, 1989) the agency's final rule nevertheless permits regulated entities to house primates in isolation from each other.

NABR has not adequately explained either the statutory or regulatory history of the challenged regulation. A review of these histories is necessary to explain why the court of appeals' ruling that the plaintiff has standing does not conflict with other circuits' standing precedents and is fully consistent with this Court's precedent.

The 1985 Amendments to the AWA required that USDA "shall" issue "standards" that promote the psychological well-being of nonhuman primates held in zoos and laboratories. USDA has recognized that the impetus for the amendments, "arose from market failures to produce a socially acceptable level of animal welfare in the production activities of the regulated entities (animal breeders, dealers, exhibitors, . . . and research facilities)." *See* Animal and Plant Health Inspection Serv., U.S. Dep't of Agric., Final Regulatory Impact and Regulatory Flexibility Analysis of APHIS Animal Welfare Regulations, Pt. 3, Subparts A and D (1991), Court of Appeals Administrative Record ("AR") 682, 686.

The statutory language of the 1985 Amendments was a product of consensus between the scientific community and animal protection groups. 131 Cong. Rec. 14,161 (1985) (statement of Sen. Dole). [1] Thus, NABR was well aware that, as a result of the mandatory statutory requirements, its members would have to comply with USDA-imposed requirements to promote the psychological well-being of nonhuman primates.

The USDA first proposed regulations for primate psychological well-being in 1989. 54 Fed. Reg. 10,822 (March 15, 1989). Central to the proposed regulations was a standard for the social housing of primates, *i.e.* primates normally would have to be kept together with members of their species. USDA explained that this requirement was "based upon scientific evidence and [agency] experience, both of which indicate that nonhuman primates . . . require contact with other nonhuman primates for their psychological well-being," and that "[s]ocial deprivation is regarded by the scientific community as psychologically debilitating to social animals," 54 Fed. Reg. at 10,917 (March 15, 1989). Accordingly, the proposed regulations provided that

> [n]onhuman primates must be housed in primary enclosures with compatible members of the same species, . . . in pairs, family groups, or other compatible social groupings unless the attending veterinarian determines that doing so would endanger the health, safety and well-being of the nonhuman primates.

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[1] Biomedical research organizations had opposed every bill introduced to improve conditions for animals in laboratories prior to passage of the Animal Welfare Act in 1966 and subsequent strengthening amendments to that Act. *See* Gary L. Francione, *Animals, Property and the Law* 189-94, 198-99 (1995)

Proposed § 3.80(b), 54 Fed. Reg. at 10,944 (March 15, 1989).

The proposed rule also provided a list of minimum standards that regulated entities would be required to meet. For example, the proposed rule would have required the regulated entities to: a) enrich the environment by providing species-typical activities, Proposed § 3.81(a)(1), 54 Fed. Reg. at 10948 (March 15, 1989), b) release individually-housed primates into a much larger enclosure than their primary cage for 4 hours of exercise and social interaction, Proposed § 3.81(a)(3), 54 Fed. Reg. at 10948 (March 15, 1989), and c) provide additional environmental enrichments, social interaction and exercise for young primates, those on restricted activity, and those in psychological distress, Proposed § 3.81(a)(4)(i)-(iii), 54 Fed. Reg. at 10949 (March 15, 1989). The USDA concluded that "the space requirements of proposed § 3.80(c)(1), together with the requirements in § 3.81 will promote the psychological well-being of primates ," 54 Fed. Reg. at 10,920 (March 15, 1989).

NABR criticized the proposed regulations, claiming that "they paint a very detailed picture of laboratory animal care. They tell you point by point --- and that's exactly what we object to." *See* Gwen Rubinstein, *Creature Discomforts*, Gov't Info. Insider, June 1990 at 11. NABR spent the next two years opposing the proposed regulations that specified how it and other regulated entities must improve the physical environments provided to primates.

The USDA then significantly modified its regulatory approach. *See* Carol Matlack, *Animal Rights Furor*, The Nat'l J., Sept. 7, 1991, at 2143. ("And after the association [NABR] swamped the Agriculture Department with thousands of complaints from scientists, the department significantly

weakened new regulations on the treatment of lab animals that Congress had mandated in 1985.") Thus, instead of specifying the minimum standards governing the physical environments that will promote a primate's psychological well-being, USDA changed the regulations to provide that regulated entities need only develop their own "plans" that "consider" and "address" in some fashion those aspects of a primate's environment that USDA found critical. *See* 9 C.F.R. § 3.81 (1997). In addition, USDA changed its requirement for the social housing of primates to provide that the regulated entities' "plans" must simply "address" the social needs of primates, but that the "plans" need not require group housing. 9 C.F.R. § 3.81(a). These "plans" only have to be submitted to USDA if USDA requests them. 9 C.F.R. § 3.81 (1997).

In its petition, in an effort to undercut the causal link between the challenged regulation and plaintiff's injury, NABR twice misrepresents that the final regulation at issue requires social grouping, Pet. at 4 & n.1[2]. However, even the USDA expressly recognized that this characterization of the final rule is incorrect. Thus, in the supplementary information provided in the preamble to the final rule, the USDA explained that the regulations "do not specifically call for group housing of nonhuman primates." 56 Fed. Reg. at 6472 (1991).

PROCEEDINGS BELOW

Plaintiffs brought this lawsuit in 1996. Plaintiffs include persons who enjoy visiting primates in zoos and whose

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[2] NABR represents that "[e]xceptions to 'social grouping' are permitted only in specific circumstances enumerated in the regulation." Pet. at 4. In a footnote, NABR makes the same misrepresentation a second time ("Exceptions [to social grouping] are permitted only . . .") Pet. at 4 n.1. Social housing, social grouping and group housing are synonymous terms that describe housing primates together as a social unit.

aesthetic interests in observing and enjoying primates in such settings are harmed because, under the challenged regulations, primates they visit are housed alone and in barren environments. NABR did not move to intervene in the District Court proceedings to challenge plaintiffs' standing nor for any other reason.

Plaintiffs filed a motion for summary judgment and submitted affidavits in support of their standing to bring the case, including the affidavit of plaintiff Marc Jurnove. Plaintiffs' Appendix ("Pl. App."). Mr. Jurnove's affidavit explained that he visits an animal exhibitor in his community for the purpose of observing and enjoying the animals who live there. He further explained that he has become particularly attached to several primates that are housed there, but that his enjoyment of these animals is greatly impaired because the primates are kept in isolation and in barren environments. *See* Jurnove Affidavit at ¶¶ 7-9, 14-15, 17, 20, 24, 26, 30, 33, 35, 39. Thus, Mr. Jurnove explained that "[w]hat I observed was an assault on my senses and greatly impaired my ability to observe and enjoy these captive animals." *Id.* ¶ 17.

Mr. Jurnove further explained that when he brought these matters to the attention of the UDSA on several occasions, he was informed that the facility was in compliance with all applicable USDA standards, including the provision governing "environment enhancement to promote psychological well-being." *Id.* ¶¶ 18, 22, 32, 42; USDA Inspection Report, Exhibit 1, Plaintiffs' Opposition to Defendants' Motion for Summary Judgment.

Mr. Jurnove also explained that, because of his attachment to these particular animals and his desire to help them, he will continue to visit the facility to see the animals there, to

"provide the USDA with information that may lead to better conditions for these animals," and that he "want[s] to observe, study, and enjoy these animals in humane conditions." *Id.* ¶ 43.

In response, the government did not challenge any of the factual assertions contained in Mr. Jurnove's affidavit, nor did it submit a statement of material facts as to which it claimed there was any dispute. Instead, the government simply argued that the kind of aesthetic injury asserted by the plaintiffs was not sufficient to satisfy the standing requirements of Article III.

After the District Court ruled for plaintiffs on both standing and the merits, NABR moved to intervene for the sole purpose of taking an appeal. Although plaintiffs objected to NABR's intervention, particularly on timeliness grounds, Judge Richey of the District Court permitted NABR to intervene, believing that he was required to do so because of an earlier ruling by the D.C. Circuit. *ALDF v. Glickman*, Civ. No. 96-408 (D.D.C. 1997), Mem. Op. at 7, Court of Appeals Admin. Record ("AR") at 896-97. Plaintiffs filed an appeal of that decision which has not yet been decided. AR at 904.

On December 9, 1997, a divided panel of the D.C. Circuit ruled that plaintiffs lacked standing to bring the case. *Animal Legal Defense Fund v. Glickman*, 130 F.3d 464 (D.C. Cir. 1997), Appendix ("App.") 84a. While expressing doubt that the plaintiffs had demonstrated a cognizable "injury-in-fact," Judge Sentelle, joined by Judge Henderson, nevertheless assumed that plaintiffs had satisfied this prong of the Article III test. *Id.* at 468, App. 88a. However, the majority found that plaintiffs had failed to demonstrate the requisite causation and redressability, expressing their belief that the plaintiffs' injuries flowed not from the government's inadequate

regulations but rather, from the actions of third parties -- *i.e.* the exhibitors of the animals. Judge Wald dissented, explaining that the majority's causation and redressability analysis "illustrates how far the majority opinion has strayed from a reasonable interpretation of standing requirements under Supreme Court and our circuit's law." *Id.* at 471 (Wald, J., dissenting), App. 93a.

Plaintiffs were successful in seeking *en banc* review. *ALDF v. Glickman*, 136 F.3d 829 (D.C. Cir. 1998). On September 1, 1998, in a decision written by Judge Wald and joined by six additional judges (Edwards, Williams, Randolph, Rogers, Tatel and Garland), the court of appeals held that "Mr. Jurnove's allegations solidly establish injury in fact," because his uncontested affidavit demonstrates that he suffers "direct, concrete, and particularized injury to his aesthetic interest in observing animals living under humane conditions." *Animal Legal Defense Fund v. Glickman*, 154 F.3d 426, 431 (D.C. Cir. 1998) (*en banc*), App. 7a.

Judge Wald explained that *this* Court has "repeatedly made clear that injury to an aesthetic interest in the observation of animals is sufficient to satisfy the demands of Article III standing," *Id.* at 432, App. 9a, citing this Court's observation in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 566 (1992) that "[i]t is clear that the person who *observes* or works with a *particular* animal threatened by a federal decision is facing perceptible harm." *Animal Legal Defense Fund*, 154 F.3d at 433, App. 9a (emphasis supplied). Judge Wald further observed that, analogously, both "the Supreme Court and this circuit have frequently recognized the injury in fact of plaintiffs who suffered aesthetic injury stemming from the condition and quality, or despoilation" of a specific environmental area that they use. *Id.* at 434, App. 13a.

The court also held that Mr. Jurnove had demonstrated the requisite causation, since he alleged that the conditions that caused his injuries were *authorized* by the regulations issued by the USDA, and because he had produced evidence that the USDA, in fact, considers the exhibitor in question to be in compliance with all applicable USDA standards. 154 F.3d at 439-40, App.21-22a.

The court likewise held that Mr. Jurnove had demonstrated redressability, since his complaint asserts that more stringent regulations, which prohibit the inhumane conditions that have caused his aesthetic injuries, "would necessarily alleviate Mr. Jurnove's aesthetic injury during his planned, future trips" to the facility to visit the animals there. 154 F.3d at 443, App. 28a. The court therefore remanded the case to a panel of judges to determine the merits of plaintiffs' claims. App. 32a.[3]

In a dissent joined by three judges (Silberman, Ginsburg, and Henderson), Judge Sentelle expressed the opinion that a plaintiff with an aesthetic interest in observing a *particular* animal could not satisfy the injury in fact requirement of Article III, without demonstrating that the challenged governmental action threatened to reduce the *overall* number of all such animals that are available for observation and study. 154 F.3d at 447, App. 35a. The dissent also expressed the opinion that Mr. Jurnove had failed to demonstrate causation, finding that his uncontested assertions and additional proof that the USDA *permitted* the conditions that caused his injuries were "disingenuous" in light of Mr. Jurnove's additional complaints that the agency was not adequately enforcing the regulations it *does* have. 154 F.3d at

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[3] Also pending is plaintiffs' appeal challenging NABR's intervention. D.C. Cir. Appeal No. 97-5074. These matters have been held in abeyance pending the resolution of NABR's petition for *certiorari*. January 22, 1999 Order (D.C. Cir.).

451, App. 42a. The dissent also took issue with whether the challenged regulations actually "authorized" exhibitors to maintain primates in ways that caused Mr. Jurnove's aesthetic injuries, despite the fact that the uncontested record demonstrated that the USDA had determined that the exhibitor in question was in fact in compliance with those regulations. 154 F.3d at 452, App. 432. The dissent further expressed the opinion that Mr. Jurnove had failed to show redressability because he could not prove that any *new* regulations that would be promulgated if the challenged ones were set aside would necessarily redress any of the conditions that caused his aesthetic injuries. 154 F.3d at 454, App. 47a.

Although the government defendants have not sought certiorari of the *en banc* decision, and the merits of plaintiffs' case have not yet been decided, intervenor NABR has petitioned this Court for a writ of certiorari. As demonstrated below, however, none of the criteria governing the granting of such petitions is present here. Accordingly, the petition should be denied.

REASONS FOR DENYING THE PETITION

I. THE D.C. CIRCUIT'S OPINION DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS.

Certiorari is not warranted here because the decision of the court of appeals is not in conflict with the decision of any other federal courts of appeals. Indeed, NABR concedes that there is no conflict between the circuits. Petition ("Pet.") at 12-13. Accordingly, NABR is left to argue that there is a conflict in *principle* because different circuits have given "differing interpretations" of *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982) and the majority did not even cite *Valley*

Forge. However, as explained below, the majority did not cite or discuss *Valley Forge* because that case simply does not apply here. In any event, because petitioner cannot demonstrate that review is necessary to resolve a split in the circuits on *any* issue, let alone one of any significance, *certiorari* is not warranted. Moreover, while review is sometimes afforded because a decision on jurisdiction must be immediately corrected due to the far-reaching consequences such a ruling would have, as respondents demonstrate *infra*, this simply is not such a case.

II. THE DECISION BELOW FAITHFULLY FOLLOWS SUPREME COURT STANDING PRECEDENT.

A grant of *certiorari* is also not warranted because the court of appeals faithfully applied this Court's precedents on standing. As further demonstrated below, the court correctly ruled that plaintiff Jurnove's injuries fall well within this Court's precedents on injury, causation and redressability, as well as within this Court's specific application of these principles in the context of cases brought to challenge government actions that affect animals.

A. Injury In Fact

Noticeably absent from NABR's petition is any explanation of why the injury Mr. Jurnove suffered is not a cognizable injury under *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (hereinafter *"Defenders of Wildlife"*). There, this Court explained that "it is clear that the person who observes . . . a particular animal threatened by a federal decision clearly is facing perceptible harm," 504 U.S. at 566.

Thus, try as it may by repeatedly labeling plaintiff's injuries as "subjective," "ideological," and "emotional," and

arguing that "the decision below is wrong," Pet. at 13, NABR cannot dispute that plaintiff suffered a concrete injury to his aesthetic interest in viewing animals --- an interest long recognized as cognizable for standing purposes. Moreover, as the court of appeals observed, plaintiff Jurnove suffered his injury "in a personal and individual way — for instance, by seeing with his own eyes the particular animals whose condition caused him aesthetic injury," 154 F.3d at 433, App. 9a. That he could, *as a result of the direct sensory impact*, also have suffered psychological distress, is expected, as even NABR acknowledges. Pet. at 12.

However, NABR not only ignores plaintiff Jurnove's affidavit but also twists the holding of *Valley Forge*, 454 U.S. 464 (1982), to suit its own purposes. NABR ignores that plaintiff Jurnove suffered an aesthetic injury as a result of actually *seeing* these animals suffering from isolation and the lack of psychological enrichment. These facts take this case far from the circumstances present in *Valley Forge* and place it squarely within the analysis applied in *Sierra Club v. Morton*, 405 U.S. 727 (1972), and *Defenders of Wildlife*.

In *Valley Forge*, this Court held that persons who were not directly impacted by the allegedly unlawful conduct, but had simply read about the government's actions in the newspaper, had not suffered the kind of concrete injury that is necessary to establish standing. The Court held that the plaintiffs in *Valley Forge* had "fail[ed] to identify any personal injury suffered by [them] *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." 454 U.S. at 486 (emphasis in original). However, when this Court spoke of the "observation of conduct with which one disagrees," it was *not* addressing the actual *visual* observation of illegal conduct by a person whose

aesthetic interests are injured by that conduct, such as the person who actually *observes* a polluted landscape -- an aesthetic injury which, although also subjective, this Court long ago recognized would satisfy the "injury" requirement of Article III. *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972).

Nor did *Valley Forge* address the kind of plaintiff who actually observes harm inflicted on a "particular animal," which, as this Court recognized in *Defenders of Wildlife*, 504 U.S. at 556, produces "injury" for standing purposes. Rather, in *Valley Forge*, the Court was simply recognizing that plaintiffs do not show the necessary "injury in fact" when they simply disagree with conduct that the government is taking somewhere in the country, but which does not impact those particular plaintiffs in any direct way. Accordingly, that decision is not implicated here, and, therefore, not surprisingly, the majority opinion below had no reason to address it.

A central theme of NABR's petition is that a plaintiff can not suffer injury to a cognizable interest unless he complains of a diminution in the overall number of animals of that species that will now be available for observation as a result of the challenged government action. Pet. at 11-12. Of course, this proposition ignores this Court's observation in *Defenders of Wildlife* that "a person who *observes* or works with a *particular* animal threatened by a federal decision is facing perceptible harm . . . ," 504 U.S. at 566. Indeed, under NABR's analysis, as well as that of the dissent below, a court could never hear the case of persons who complained of harm to a particular national park they frequented unless the government action would result in destroying *all* national parks.

NABR's petition further suffers from a failure to grasp one of the most basic concepts of standing jurisprudence — that standing is a highly case-specific inquiry. NABR fails to appreciate that a majority of the standing cases it discusses were brought pursuant to the APA, which requires an analysis of the injury asserted in light of the statute the plaintiff claims the agency violated. Here, for example, the AWA is not concerned with maintaining a certain population of endangered animals. Therefore, where a plaintiff is complaining about an agency's intentional violation of a statute requiring that it set standards for an environment that promotes a primate's well-being, it would make absolutely no sense for the plaintiff to complain that this challenged action resulted in diminishing the number of animals available for observation. However, it is perfectly logical for a plaintiff who enjoys observing and studying particular primates in captivity to complain of a regulatory scheme that results in those animals being kept in isolation and in barren environments. Thus, as the 7-judge majority of the D.C. Circuit explained

> the Animal Welfare Act, with which we deal here, is explicitly concerned with the quality of animal life, rather than the number of animals in existence. It seeks to promote the psychological *well-being* of primates. Quite naturally, suits alleging violations of this statute will focus on the conditions under which animals live.

154 F.3d at 438, App. 18a (emphasis in original) (statutory citations omitted).

Moreover, contrary to NABR's assertions, Pet. at 13-14, as well as those of the dissent below, one need not foray into such areas as what Mr. Jurnove thinks is "humane," because in this case there is a record of the agency making an expert

determination of what is needed to provide a physical environment that will promote the psychological well-being of nonhuman primates --- and then choosing not to require it.

Indeed, the plaintiff was visually impacted by the very same conditions that the defendant agency stated it knew were psychologically debilitating to primates --- *e.g.*, keeping primates isolated from each other. Therefore, there is absolutely no need to speculate as to the veracity of the plaintiff's allegations about what he witnessed and its impact on him, nor is such speculation in the least bit appropriate when the plaintiff's sworn affidavit was completely uncontested before the District Court. The bottom line here is that an agency was ordered by Congress to issue standards to accomplish a statutory goal --- *i.e.*, to require environments that promote the psychological well-being of nonhuman primates. Instead, the agency left that task to the very entities which had demonstrated that --- in the absence of specific mandated instructions from the agency --- they would not take the actions necessary to promote the psychological well-being of nonhuman primates. This failure on the part of regulated entities prompted Congress to enact the 1985 Amendments to the AWA. *See supra at 2.* Under the Administrative Procedure Act, such derelictions of statutory duty may be challenged by persons who are injured by that conduct --- precisely what was done here[4].

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[4] NABR's assertions in the form of a parade of horribles of all sorts of private party conduct that can now be challenged as a result of this decision is a red herring. Pet. at 16-17. As NABR well knows, there is no private right of action against private parties such as NABR's members under the Animal Welfare Act. *See, e.g., International Primate Protection League v. Institute for Behavioral Research*, 799 F.2d 934 (4th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987). Accordingly, the decision below provides no basis for challenging third party conduct under that statute.

B. Causation

This Court's recent decision in *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, (*"NCUA"*) ___U.S. __ , 118 S.Ct. 927 (1998), although a "zone of interest" case, demonstrates that the court of appeals correctly ruled that plaintiffs satisfy the causation requirement of Article III --- *i.e.*, that plaintiffs' injuries are "fairly traceable" to the defendant's unlawful conduct. *Valley Forge, supra,* 454 U.S. at 472.

NCUA involved a challenge by several commercial banks to the National Credit Union Administration's construction of its governing statute that allowed credit unions to include in their membership businesses that are unaffiliated with the credit unions' existing membership. Although this Court acknowledged that the plaintiffs must demonstrate that they meet all of the standing requirements of Article III, __ U.S. __, 118 S.Ct. at 933, neither the majority nor the dissent ever suggested that there was a causation problem, simply because the government "permitted," but did not "require," a third party to engage in conduct that resulted in injuries to the plaintiff.

As in that case, here the plaintiff complained that his injuries result from the government's unlawful decision to allow regulated entities to conduct their business in a way that would *not* be allowed if the government were required to fulfill its statutory mandate. In other words, if the USDA promulgated the "standards" for the psychological well-being of primates, as required by the AWA, it would be illegal for regulated entities to develop their own "plans" for this aspect of primate care. Accordingly, as this Court obviously assumed in *NCUA*, plaintiff's injuries are "fairly traceable" to the government's unlawful conduct.

Indeed, as the majority below recognized, the Supreme Court has several times ruled that plaintiffs demonstrate standing when the challenged agency action "authorizes" the conduct that causes their injuries, when such conduct "would have been illegal without that action," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 44, n.25 (1976); *Investment Co. Inst. v. Camp*, 401 U.S. 617, 620-21 (1971); *Data Processing Serv. v. Camp*, 397 U.S. 150, 152 (1969). Here, because Congress directed USDA to address the problem of regulated entities *not* providing for the psychological well-being of primates, the USDA's final regulation which allows these entities to continue to ignore this aspect of primate care by keeping the animals in isolation without any minimum psychological enrichment, authorizes the very conduct that is causing plaintiff's injuries. Accordingly, the court of appeals correctly applied this Court's precedent on this prong of the standing test.

C. Redressability

The court of appeals also correctly ruled that Mr. Jurnove had demonstrated the requisite redressability. Thus, if Mr. Jurnove prevails on the merits, entities subject to the AWA, including the facility he visits, will no longer be permitted to house primates in isolation and without a physical environment that promotes their well-being. Unless the regulated entity decides to violate the new regulations, and subject itself to both civil and criminal penalties for doing so --- a speculative and highly unlikely outcome that the plaintiff is not required to disprove, *Duke Power Co. v. Carolina Envt'l Study Group, Inc.*, 438 U.S. 59, 78 (1978) --- this relief will more than "partially redress" Mr. Jurnove's injury, *Meese v. Keene*, 481 U.S. 465, 476 (1987), which is all that this Court requires to meet the redressability test.

As this Court recently recognized in *Federal Election Comm'n v. Akins*, ___ U.S. ___, 118 S.Ct. 1777 (1998), redressability is present "[i]f a reviewing court agrees that the agency misinterpreted the law, [because] it will set aside the agency's action and remand the case." ___ U.S. ___, 118 S.Ct. at 1786. This is precisely what the plaintiff has requested here. Furthermore, under *Bennett v. Spear*, ___ U.S. ___, 117 S.Ct. 1154 (1997), the Court assumes that the regulated third party will conform its conduct to comply with a mandated legal regime. ___ U.S. ___, 117 S.Ct. at 1168.

III REVIEW OF THE STANDING ISSUE PRESENTED BY NABR WOULD BE PREMATURE.

NABR did not intervene in this case until after judgment was entered in plaintiffs' favor in the District Court. Because this was the second time that NABR had waited until after judgment to seek intervention --- and because, in this instance, there was no question that the government was going to appeal the ruling, thereby fully protecting NABR's interests --- plaintiffs filed their own appeal on the issue of whether the District Court properly allowed NABR's post-judgment intervention. This issue has not yet been resolved by the court of appeals.

Therefore, because the government has not sought *certiorari*, should plaintiffs prevail in *their* appeal challenging NABR's intervention, this Court would not have to resolve the standing issue that NABR seeks to present. By the same token, the merits of the plaintiffs' case are also still pending before the Court of Appeals. Indeed, it is for reasons such as these that this Court generally awaits final judgment in the lower courts before exercising *certiorari* jurisdiction. *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993); *American*

Const. Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U.S. 372, 384 (1893). Accordingly, there is no reason why this Court should exercise its discretion to hear this case at this juncture.

IV. NABR HAS PROVIDED NO OTHER PERSUASIVE REASON WHY THIS CASE MERITS REVIEW.

None of the additional reasons NABR urges as a basis for review has any merit. First, NABR argues that if individuals have standing under the AWA, challenges could be brought against regulations affecting research facilities, as well as zoos. Pet. at 16-17. However, NABR cites no reason whatsoever as to why research facilities should not be governed by the same regulations that govern other entities housing primates. Indeed, the AWA very explicitly applies to both kinds of facilities.

Moreover, it bears noting that, pursuant to the AWA, NABR members and other research facilities already enjoy a complete exemption from regulations addressing how research is conducted. Thus, the statute provides that, "[n]othing in this chapter . . . shall be construed as authorizing the Secretary to promulgate rules, regulations, or orders with regard to the design, outlines, or guidelines of actual research or experimentation by a research facility as determined by a research facility." 7 U.S.C.§ 2143(a)(6)(A). NABR's interest asserted here is in *further* exempting itself from having to comply with AWA regulations governing the care of primates while those primates await their use in research. However, the statute recognizes no such additional exemption. Accordingly, there is no reason why NABR members should not have to comply with new regulations if the challenged regulation is found to be illegal, once this case is decided on the merits.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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March 1, 1999

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANIMAL LEGAL DEFENSE FUND, INC ,
et. al., Plaintiffs

v.

DANIEL GLICKMAN, Secretary,
United States Department of
Agriculture, et al ,
Defendants

Civil No. 96-408
(CRR)

AFFIDAVIT OF MARC JURNOVE

1. I am a plaintiff in this case I submit this affidavit in support of Plaintiffs' Motion for Summary Judgment and in support of Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss and Motion for Partial Summary Judgment.

2. I have personal knowledge of the facts and matters contained in this affidavit.

3. I was born on March 18, 1950 and am now 46 years old. Due to my upbringing and religious beliefs, I became sensitive to many areas of human and animal suffering at an early age. During my entire adult working life, I have been

employed and/or worked as a volunteer for various human and animal relief and rescue organizations. From 1969 to 1982, I served as a volunteer Auxiliary Police Sergeant. From 1972 to 1985 I was a volunteer fireman. I am still a N.Y. State certified fire inspector. Since 1972, I have been a shelter manager for the American Red Cross, assisting in national and international disasters. In this capacity, I have also been involved in the emergency housing and care of pets and livestock displaced by disasters. Since 1975, I have been an Emergency Medical Technician and an Advanced First Aid Instructor.

4. I have also been employed and/or served as a volunteer in the field of animal welfare. From 1970 to 1988, when I retired at the rank of Lieutenant, I was a Mounted Park Ranger. Besides my mounted duties, which included directing daily activities, training mounted officers in the proper care of their horses, calling the equine veterinarian and blacksmith when needed, I was assigned to handle illegal trapping and any animal related problems in the park system. From 1972-1984, I was the chief investigator for the Long Island Humane Society.

5. From 1977-1984, I was a special agent for the American Society for the Prevention of Cruelty to Animals, which has statutory law enforcement responsibilities within the State of New York. There, I was assigned to the special investigation unit where I handled equine, livestock, exotic animal, pet store and petting zoo types of animal welfare cases.

6. Since 1979, I have been a New York State representative of the American Horse Protection Association. In that capacity, I investigate complaints of mistreatment or abuse of equines, educate the public about proper equine care

and assist with investigations when requested. Since 1979, I have also been a licensed wildlife rehabilitator; this task requires a thorough knowledge of caring for injured wildlife, both domestic and exotic. In the past, due to my knowledge of exotic and sea mammals, several federal agencies have requested my involvement in investigating exotic and sea mammal neglect at various zoo attractions. By virtue of my training in wildlife rehabilitation and my experience in investigating complaints about the treatment of wildlife, I am very familiar with the needs of and proper treatment of wildlife.

7. Because of my familiarity with and love of exotic animals, as well as for recreational and educational purposes and because I appreciate these animals' beauty, I enjoy seeing them in various zoos and other parks near my home. I do not have the resources or opportunity to see many of these species in the wild. I had never visited the Long Island Game Farm before but in mid-May of 1995, in my capacity as an equine investigator, I was apprised that several ponies needed to be checked on at that location. Once I was there, in furtherance of my appreciation for exotic animals and my desire to observe and enjoy them, I began to look around at the other animals housed there. I immediately became concerned for their welfare due to the conditions they were housed in and various signs of illness or injury that they were displaying. I spent approximately six hours at the Game Farm that day observing the animals.

8. I saw a large male chimpanzee named Barney in a holding area by himself. He could not see or hear any other primate. I saw Barney sitting there holding himself with one arm while he stuck his other arm out of the bottom of his cage, begging for food from the visitors. No matter where he reached his hand out it was right next to a clamp or broken

cage piece. He had cuts all over his hands and scars and cuts on the bottom of his feet. I know that chimpanzees are very social animals and it upset me very much to see him in isolation from other primates. I also was concerned when I saw workers running by or driving golf carts by while yelling and laughing at him. This apparently upset Barney as well because he would scream, grab a tire that was hanging in his cage and pick up objects, including food, from his cage to throw at the workers as they passed by. When Barney's frustration and isolation became too unbearable for me to keep watching, I left this location and went on to see other animals.

9. The next animals I saw were three, approximately three-month-old young bear cubs that were kept in a small, round pen. These bear cubs were continuously pacing back and forth around the inside perimeter of the cage. They would walk a few feet, turn around and go the other way, go a few feet in that direction and turn around and keep repeating this without stopping. I watched them continue this activity for almost an hour until they would fall down in deep muck that was at the bottom of their cage, since there appeared to be no real drainage. There was a small barrel in this cage that would allow one of the cubs to escape laying in this mud but the others would have no dry area if it was occupied. Any rain with the slightest wind would soak these cubs. I later saw that when the cubs woke up, they lay in the muck while eating their food that had fallen out of their food dish into the mud. The cubs then began their pacing and kept repeating the cycle while making screaming noises. Watching these bear cubs continually pace in their small cage, with inadequate protection from the rain and wind, eating their food from the mud and muck in their cage greatly affronted and disturbed my enjoyment of these animals and made me want to

something to improve their conditions so that they were being treated humanely, and I could observe and enjoy them under better circumstances.

10. Next I saw two adult bears in a pen with a cement floor. The bears' fur was covered and completely matted with feces. The bears were attempting to get into a shelter, which I later found out had a door that led directly into a shelter for two squirrel monkeys. The main food for these bears was dumped into a drainage trough that runs along the outside of the cage. This trough also collects the body waste of the bears that is washed into it from the inside floor area by a high pressure hose to clean the cage. The bears' food had flies on it. On future trips to the zoo I would see the flies increase on their food as the weather got warmer until the point that in September of 1995, the bears' food was entirely covered by flies.

11. The pen next to the adult bears housed the squirrel monkeys that I mentioned. I observed the monkeys repeatedly walking over to the door and sniffing and acting very upset when the bears came near. I could not believe that any knowledgeable exhibitor would construct the cages of such species right next to each other.

12. I next saw camels and a llama. The camels were busy breaking off large sections of their shelter and chewing them. The shelter had holes all over in the roof and walls from the camels' prior eating of it. Camels, as other hoofed stock, will eat wood when they are not getting enough roughage in their diet. In the llama enclosure, the shelter overhang was only large enough for less than half of the animals at one time. There was hardly any other shade present. Under one tree that had a large puddle from drinking water were a few llama laying there trying to get shade. Their hair coats were

extremely matted, making them inadequate barriers to wind and rain.

13. The Barbados sheep pen had wire mesh that the sheep could stick their heads through and get caught on. Sharp wire ends stuck out in the mesh opening and I could see the metal was bent in places that the sheep did stick their head into. I also viewed a worker dump the hay he was feeding these sheep into a large mud puddle on the ground.

14. I viewed a monkey cage that was a distance from and not in view of the other primate cages. This cage was around 5 feet, with a single wire ledge on one side. There was no solid area for the Japanese Snow Macaque, "Samantha," inside it to lay. There was no heat lamp present for this animal. I viewed Samantha in the middle of her cage huddled up with her head tucked in and arms hugging herself. She would just raise her head to look up briefly but she would then tuck it back in. She was shivering quite noticeably; the temperature was approximately 51 degrees that day. The only cage enrichment device this animal had was an unused swing. The bottom wire mesh of this monkey's cage was wide enough for the animal's limbs to pass through it.

15. Next I saw a large cage holding five Capuchin monkeys. The cage bottom was covered with more than half its surface with pools of water due to improper grading. Food remains and old feces covered the cage bottom. Food and debris were building up under the space between the cement floor and cage meshing, and there was a very strong stench coming from the cage. The cement floor in and around the outside was cracked and breaking up with holes all around in which feces collected. An outside drainage system around the cage was also in poor condition.

16. I next saw a cement walled area containing rabbits. Their water bowl was flipped over and no water was available for the six hours I was at the Game Farm that day. Other rabbit cages I observed were dirty, with bottom mesh that allowed rabbit foot pads to go through and had no inner shelter boxes. The main holding structure had a general overhang that, while giving some shade, would not keep the animals dry in a rain storm.

17. At this point, upon seeing all of these animals housed in conditions that were appalling and that I knew violated the minimum requirements of the Animal Welfare Act, and which were otherwise harming the animals in various ways, I could not stand it any longer and left. What I observed was an assault on my senses and greatly impaired my ability to observe and enjoy these captive animals.

18. The next day, I started to contact agencies to see if I could get help for these animals. I called USDA. Dr. Geib took my call which was also followed up by a written complaint. I asked for a copy of any inspection report under the Freedom of Information Act that the agency would generate once they went to the Game Farm to inspect. On May 3 1995, USDA inspected the Farm. Their report states that they found the facility in compliance with all the standards. When I called USDA to follow up on this, they said nothing was wrong.

19. Because I knew that the USDA inspection report was incorrect, and I desperately wanted to somehow improve the living conditions of these animals, I returned to the Farm in June, July and August, 1995 to document the violations with photographs which I then sent to USDA.

20. When I returned to the Game Farm on July 17, 18 and 19, 1995, I saw the animals in virtually the same conditions

they were in when I first visited the Game Farm in May, 1995. The welfare of the animals was in ever greater jeopardy at this time because the heat was exacerbating many of the animals' problems. I saw the bears still with their matted coats and I knew that this condition made it harder for them to keep themselves cool. The baby bears were still engaging in their repeated pacing, falling down and eating out of the filthy bottom of their cages. The baby bears kept up this repetitive behavior for the entire six hours I was there, even when the temperature reached 88 degrees. I saw Barney, the chimpanzee, lying on the ground of his enclosure, staring into space and grasping onto the wire side of his cage, his hands and feet still scarred and calloused from contact with the broken wire on his cage and the cement floor of his cage. I saw Samantha still alone in her cage with no solid part on which she could comfortably sit. I saw a cougar that was kept in a cage; the animal had no water bowls to drink from. She did have an automatic water system that I understood the Game Farm was trying to get her to use. Over the course of the three days that I was there I did not see the cougar drink from this system at all. I observed the cat trying to climb wooden poles but since the cat had been declawed the cat would fall and slam against the metal fencing or on its head in the cage.

21. The USDA inspection report of July 21, 1995 cited improper shelter for the bears llamas and sheep and Barbados sheep with a correction date of September 21, 1995. USDA wrote up the chimp tower fence being pulled up along with fencing in several areas, but only in regards to the public safety fencing, not the major enclosures I took pictures of in poor condition. The inspectors wrote up the feces buildup in the Capuchins' cage along with the bear and camel dens. Also written up at this inspection was goat hoofs that needed

trimming that I had complained about earlier. The inspectors wrote nothing about the bear cubs' cage condition and food, fencing conditions, the fact that numerous primates were being housed alone, rabbits in 100 degree heat in July without cooling equipment as required by USDA regulations or any of the other conditions I observed, took pictures of or wrote to USDA about.

22. When I saw the inspection report, I called USDA to ask about the conditions that had not been corrected. I was told that the pictures did not show possible problems clearly. Due to this I decided to spend August and September videotaping the conditions that the inspection missed to show exactly what was causing problems. At this point I felt it was my responsibility to try to get the most help for these animals as was practical since USDA seemed lax and selective in what was written up. Thus, while I normally would have enjoyed seeing these animals when they were properly taken care of, and while it upset me very much to continue to see them in poor conditions, I had to make a choice between continuing to subject myself to distress and sadness by observing these animals in poor conditions and not visiting them at all, and hence, doing nothing more to improve their conditions.

23. Had I not continued to visit these animals, I would have nevertheless continued to suffer from what I had already observed since my observations haunted me on a daily basis, as they still do.

24. Disregarding my general health, I spent my time going to the Game Farm documenting my findings with a video camera when the temperatures were in the high 90's. In August, 1995, I made two trips to the Farm. On my first trip to the Farm, I observed Barney the chimp screaming and throwing a tire around and becoming very excited. He then

started to push around a soda can that someone threw near a large hold in the cage that I had reported to USDA on my first contact with them. Barney then ripped the can in half and started to chew on it. He cut his hands and mouth and they started bleeding. I notified one of the workers there, who tried to get Barney to give him the can parts. At this point, some of the other workers began jeering Barney, trying to get him to do body flips. On four occasions Barney started to jump up and down until he became disoriented and banged his head and hurt himself. The staff laughed at this and tried to get him to do it again.

25. I observed the adult bears' sprinkler system was not working and mentioned it to a worker. The bears became progressively more agitated over two days without a way to cool themselves off. This continued throughout the day. Around 3:30 p.m. as I was getting ready to leave, I noticed that the bears had not been fed. One of the workers confirmed to me that the person who was responsible for feeding the animals had not gotten around to feeding them yet.

26. I observed the Japanese snow monkey, Samantha, holding the cage bars and mouthing them, and repeatedly picking at the same part of her body. Apparently, one of the visitors had thrown in a small piece of rag for Samantha. She walked around the cage holding it and when she came to a spot she wanted to sit down on she would spread it out and use it to cushion herself against the wire mesh bottom of the cage. Samantha would bring food back to the rag and sit on it while eating her food.

27. There was another primate, a Black Handed Spider Monkey that was continually scratching himself.

28. When I visited the Farm in August, all of the conditions I had complained about earlier were still in existence. When I returned on September 4, 1995 I noticed all of the problems I had taped previously were still in existence. The Black Handed Spider Monkey was at this point scratching himself to the point of having a difficult time eating. The bear dens and camel shelter were again filthy. Flies covered the feces piled up under the fencing edge of the Capuchin cage and food in the bear cages. The bear cubs had worn a packed trail around the cage fencing with their continuous pacing. I reported all of my findings to USDA.

29. On September 25 and 26, 1995 USDA sent three inspectors to the Game Farm to inspect it. I requested and obtained copy of their inspection report through the Freedom of Information Act. While not dealing with the direct condition of the animals or any allegation I had made about the animals becoming upset, they did write up the fence conditions and stated that the facility must develop an ongoing maintenance program for all fencing, enclosures, and shelters throughout the zoo.

30. I again visited the Farm on October 1, 1995. Once again, conditions and animals were almost exactly the same as I had seen them before. The snow monkey was sitting holding herself and mouthing the bars. Her rag had been taken away. The thoughts of all of the animals stayed with me and still do to this day. At the end of the summer, I went to my doctor who advised I needed a heart valve repair due to the increased strain that had been put on it during the summer. During an operation I was given an artificial heart valve and was put on life support. During this time the only thing I remember was continuously thinking about the Game Farm and the poor conditions of the animals I witnessed there.

31. During the winter months, I wondered how the primates from the Game Farm were doing. I had reviewed an inspection report from the Farm's winter quarters that was completed in 1991. That inspection stated that no animals were found because the Game Farm neglected to tell USDA of its whereabouts. When the USDA did find them, the winter quarters had no health certificate, improper record keeping, poor housekeeping of the primate area that was in a garage and no primate psychological well-being plan present. The next inspection of the winter quarters was not conducted until November, 1994. I asked USDA to check the winter quarters which they did on November 28, 1995.

32. The report provided me from this inspection showed that the primates were found in a room with paint thinners, paint cans and other items in cages very rusted with dirt and grime, with high ammonia levels and that primates were found wet in their cages that had no shelves and no platforms to stay dry on when cages were washed out. The report further found that the primates had no health certificates and there was not a program of veterinary care. I couldn't imagine that in a place that would house primates in such conditions there would even exist a primate well-being "plan", much less that it would be followed, but USDA's inspection report was silent on this regulation. The inspector allowed the "winter quarters" until December 9, 1995 to correct these violations. When I learned this, I became very distraught. When I called USDA at the end of February, 1995 to determine whether the winter quarters were inspected again, I was told that no follow up inspection had been made. I was given the number of the inspector. I called her and she conducted the follow-up inspection on March 4, 1996. That inspection found the main electric panel not working with a correction date of March 9, 1996, that the cages had not been cleaned and no health

certificate or form showing medical treatment could be found. The Game Farm was not given a "correct-by" date for these violations and no follow-up inspection was made.

33. During April, 1996, I was nervously awaiting an eye operation to correct a problem which occurred as a result of medication I was given while in the hospital. A friend of mine suggested that we go and visit the animals at the Game Farm to get my mind off the operation. I agreed to go, believing that it should be an enjoyable trip because of all the improvements that would have been made as a result of USDA's September, 1995 inspection, which I had been responsible for. To my dismay and sadness, I saw the animals in literally the same conditions as I had seen them over the summer of 1995.

34. The bears' den was filthy and slimy and again had a stench to it. Soiled matter was overflowing to the outside of the shelter entrance. Unrepaired wire protruded inside and around the cage. The camels' cage still had a broken wire hole that I saw last year. The shelter floor had a manure depth of 1 foot. Food was still being put on top of body waste. The Black Handed Spider Monkey I worried about that USDA had told me was being treated was rolling on the ground scratching with both hands, with hair missing and reddened, bleeding skin showing. His cage mate was rolling on the ground violently.

35. The Japanese Snow Monkey had no access to a feeding station. No play toys were in her cage. She just sat huddled and shivering violently with head tucked in. She was doing the same thing she had done last April to deal with the cold and the fact she was not provided a heat lamp. The sheep, Barbados sheep pens and a monkey pen still had sharp wire protrusions or holes.

36. Another group of small bear cubs under three months old had been born, taken away from their parents, and placed like last year's group of young cubs, in the same enclosure. I do not know what happened to last year's group of bear cubs, but I did not see them at the Game Farm. This year's group of cubs now engaged in the same pacing from left to right and right to left until they reached the side of the pen. A worker at the Game Farm told me that no food at all is being left in the cage during visiting hours so no one can complain about the condition of the food. Due to this the bear cubs are hungry and active with nothing to do but pace. While pacing they, like last year's group, made screaming noises.

37. While at the Game Farm, I saw several animals in need of veterinary attention. One of the deer had a loud hacking cough, a raccoon was very congested and in a small pen by the donkeys, a llama could hardly walk and was lame in the left rear leg. This

38. I noticed the rabbits still had no proper shelter from the rain to keep them dry and no cooling system existed for high temperatures.

39. When I went on April 28, 1996 I saw Barney. He was engaging in the same behaviors as before. He was still without any other primate ...This was the last time I saw Barney.

40. On June 6, 1996, Barney escaped from his cage and was shot to death by a Game Farm worker. Upon hearing this news, I was extremely distraught and I still am.

41. I am still gravely concerned about the care and welfare of the animals at the Game Farm, especially as the hot weather approaches. What I saw at first shocked me but then has made me very upset and then angry that after USDA goes

to inspect, that corrections still had not been made, that write ups by USDA carry no real meaning because they are not followed by fines or any other punishment. I have concluded that the USDA was just "going through the motions" to placate me because of my many calls and submissions.

42. I have requested and reviewed the May, 1996 inspection reports from the Game Farm. The May 22 and 23, 1996 inspection report fails to cite the Game Farm for inadequate environmental enhancements in Samantha's cage. The only mention of Samantha is that the wire mesh beneath her feeder has been cleaned. Although a continuing violation, inadequate shade for camels and bears, was once again cited, the inspector gave the Game Farm a month to provide adequate shade for these animals. Also in this inspection report, for the first time the inspector cited the Game Farm for inadequate environmental enhancements in Barney's cage (ropes not high enough in cage to allow brachiating). Ironically, the Game Farm was cited for this violation only after this lawsuit was filed. Even more ironically, the "correct by" date given for the Game Farm to correct the violation was the day Barney died.

43. I will return to the Farm in the next several weeks, and I will continue visiting the Farm to see the animals there. I want to observe, study, and enjoy these animals in humane conditions. I worry that their conditions will not have improved, and that I will again experience great distress in observing them under inhumane conditions. However, I also cannot bear <u>not</u> to visit these animals. I continue to think about them, and experience the assault on my senses from remembering their plight. At least if I visit them, I can provide them with some companionship and continue to provide the USDA with information that may lead to better conditions for these animals that will allow me to visit and

observe them, and enjoy them in humane conditions. I feel that if I did not return, I would be deserting them.

Pursuant to 28 U.S.C. 1746 I declare under penalty of perjury that the foregoing is true and correct.

Marc Jurnove

Executed this 12th day of June, 1996

Supreme Court, U.S.
FILED
MAR 1 1999
CLERK

No. 98-1059

In the Supreme Court of the United States

OCTOBER TERM, 1998

NATIONAL ASSOCIATION FOR BIOMEDICAL RESEARCH,
PETITIONER

v.

ANIMAL LEGAL DEFENSE FUND, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether an individual who observes primates in captivity at exhibition facilities, and who objects to what he believes to be inhumane treatment of such primates, has standing under Article III of the Constitution to challenge the legality of regulations promulgated by the Department of Agriculture governing the treatment of primates in such facilities.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-1059

NATIONAL ASSOCIATION FOR BIOMEDICAL RESEARCH, PETITIONER

v.

ANIMAL LEGAL DEFENSE FUND, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals sitting in banc (Pet. App. 1a-49a) is reported at 154 F.3d 426. The original panel opinion (Pet. App. 84a-103a) is reported at 130 F.3d 464. The opinion of the district court (Pet. App. 50a-83a) is reported at 943 F. Supp. 44.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1998. On November 24, 1998, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 30, 1998. The petition for a writ of certiorari was filed on

December 30, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Animal Legal Defense Fund, Inc. and several individuals (the private respondents) brought this action against the Department of Agriculture (USDA) and certain of its officials (the federal respondents). The private respondents challenged 9 C.F.R. 3.81, which regulates the treatment of primates by dealers, research facilities, and exhibitors. Among other things, the private respondents argued that Section 3.81 failed to fulfill the USDA's statutory obligation under the Animal Welfare Act (AWA), 7 U.S.C. 2131 *et seq.*, to "promulgate standards to govern the humane handling, care, [and] treatment * * * of animals, * * * includ[ing] minimum requirements * * * for a physical environment adequate to promote the psychological well-being of primates." 7 U.S.C. 2143(a)(1) and (a)(2)(B).

Respondent Marc Jurnove, the sole respondent presently at issue, alleged that he had standing because (1) he frequently visited a particular zoo and intended to continue doing so, (2) he observed the primates in the zoo in conditions that he believed were inhumane and inconsistent with the requirements of the Animal Welfare Act, and (3) he suffered personal distress and aesthetic and emotional injury when observing primates under those conditions. Pet. App. 3a-5a, 7a-8a.

2. The district court found that Jurnove and other individual respondents had standing, and ruled for the plaintiffs on the merits. Pet. App. 50a-83a. Petitioner, the National Association for Biomedical Research, intervened in the district court for purposes of noting an appeal. *Id.* at 93a. The United States also appealed. A

divided panel of the United States Court of Appeals for the District of Columbia Circuit held that plaintiffs lacked Article III standing. *Id.* at 84a-103a.

3. The court of appeals granted rehearing in banc, and held that Jurnove had established Article III standing. Pet. App. 105a, 1a-49a.

a. The in banc majority held that Jurnove had established injury in fact, because he had seen "with his own eyes the particular animals whose condition caused him aesthetic injury." Pet. App. 9a. The majority explained that both this Court and the courts of appeals have recognized that injury to aesthetic interests can support standing. *Id.* at 8a-17a. It rejected the argument that such injury supports standing only if the environmental feature in which the plaintiff asserts an aesthetic interest is threatened with destruction. *Id.* at 17a-18a.

The majority also held that Jurnove had established that his injury was "fairly traceable" to actions of the USDA, because Jurnove's claim was that the USDA's regulation unlawfully failed to prohibit some of the mistreatment Jurnove claimed to have observed. Pet. App. 19a-22a. The majority rejected the argument that actions of third parties are not fairly traceable to government regulation unless the government regulation specifically authorizes or compels the challenged actions. *Id.* at 24a-28a.

The majority further held that Jurnove's injury would likely be redressed by a favorable ruling, because stricter regulations would prevent the alleged mistreatment that caused Jurnove's injury and would permit Jurnove to visit the zoo in the future without suffering that injury. Pet. App. 28a. The majority also stated that if the zoo were to shut down rather than comply with stricter regulations, Jurnove might visit the

animals "he has come to know in their new homes within exhibitions that comply with the more exacting regulations."[1] *Ibid.*

Having determined that Jurnove had standing, the majority left "a determination of the merits of the plaintiffs' claim to a future panel." Pet. App. 32a.

b. Judge Sentelle dissented, joined by Judges Silberman, Ginsburg, and Henderson. Pet. App. 32a-49a. The dissent concluded that "Supreme Court cases addressing aesthetic injury resulting from the observation of animals are limited to cases in which governmental action threatened to reduce the number of animals available for observation and study." Pet. App. 35a. Extending standing to persons claiming that animals were being treated inhumanely, the dissent reasoned, would "open[] an expanse of standing bounded only by what a given plaintiff finds to be aesthetically pleasing." *Id.* at 37a.

The dissent also disagreed with the majority's conclusion that Jurnove's injury was "fairly traceable" to the USDA. Pet. App. 40a-46a. According to the dissent, the actions of a third party (here the zoo exhibitor) are fairly traceable to government regulation only if those actions are expressly authorized or compelled by the regulation in question. *Id.* at 45a-46a.

Finally, the dissent concluded that it was not likely that Jurnove's injury would be redressed by a favorable ruling. Pet. App. 46a-48a. The dissent viewed Jurnove's aesthetic injury as so indistinct that there was no way to tell whether more stringent regulations would ameliorate it. *Id.* at 47a. In addition, the dissent

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[1] In addition to finding that the requirements of Article III were met, the majority held that Jurnove fell within the zone of interests protected by the AWA. Pet. App. 29a-31a.

thought it quite speculative that Jurnove would be able to continue to observe the primates in question if the zoo were to shut down in response to more stringent regulations. *Id.* at 47a-48a.

ARGUMENT

Although we believe that the court of appeals erred in ruling that respondent Jurnove had standing, review by this Court is not warranted at this time. Because the court of appeals has not yet determined the merits of the private respondents' claims, this case is in an interlocutory posture. If the court of appeals were to rule in favor of the private respondents on the merits, either the United States or the petitioner would be free to seek review not only of that determination but also of the court of appeals' ruling that respondent Jurnove had standing. See, *e.g.*, *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 672 n.19 (1979); *Reece* v. *Georgia*, 350 U.S. 85, 87 (1955). Except in extraordinary cases, this Court's practice in such circumstances is to decline to exercise certiorari jurisdiction. See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("[E]xcept in extraordinary cases, the writ [of certiorari] is not issued until final decree. [The absence of a final judgment] of itself alone furnishe[s] sufficient ground for the denial of [an] application.") (citations omitted); see also *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of petition for writ of certiorari).[2]

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[2] No adequate basis for departing from the Court's usual practice of avoiding premature review is presented by petitioner's claim (Pet. 12-13) that the ruling of the court of appeals conflicts

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1999

"at least in principle" with decisions from the Fourth, Fifth, and Ninth Circuits. See *Fund for Animals, Inc.* v. *Lujan*, 962 F.2d 1391, 1395-1397 (9th Cir. 1992) (finding standing because plaintiffs "suffered an injury arising from a direct sensory impact of a change in [their] physical environment" when they observed bison being shot) (internal quotation marks omitted); *International Primate Protection League* v. *Administrators of Tulane Educ. Fund*, 895 F.2d 1056, 1059 (5th Cir. 1990) (plaintiffs lacked standing to challenge treatment of laboratory animals because plaintiffs had no future access to animals), rev'd on other grounds, 500 U.S. 72 (1991); *International Primate Protection League* v. *Institute for Behavioral Research, Inc.*, 799 F.2d 934, 938 (4th Cir. 1986) (same), cert. denied, 481 U.S. 1004 (1987).

Supreme Court, U.S.
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No. 98 - 1059

IN THE

Supreme Court of the United States

October Term, 1998

NATIONAL ASSOCIATION FOR BIOMEDICAL RESEARCH,

Petitioner,

V.

ANIMAL LEGAL DEFENSE FUND, INC., *et al*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

No. 98-1059

NATIONAL ASSOCIATION FOR BIOMEDICAL RESEARCH,

Petitioner,

v.

ANIMAL LEGAL DEFENSE FUND, INC. *et al.*,

Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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1. The Federal Respondents agree that the decision of the *en banc* majority of the District of Columbia Circuit is wrong. Opposition of Federal Respondents ("Fed. Opp.") at 5. Their sole basis for opposing certiorari is an argument that the case is in an "interlocutory posture" because the court of appeals has not yet decided the merits of Mr. Jurnove's claim that the regulation at 9 C.F.R. § 3.81 is invalid. Fed. Opp. at 5.

In fact, however, the practice of this Court does not support the conclusion that the writ should be withheld until the merits of the case are finally decided by the court below. The 16 cases cited in the margin show that the Court has repeatedly

granted certiorari to review standing decisions before the lower courts have rendered a final decision on the merits.[1] Once the court of appeals renders a final decision on Article III standing, the pendency of the underlying dispute has not been viewed as a barrier to immediate review of the constitutional issue in this Court.

No respondent has cited any case that is to the contrary. Neither standing nor any other issue of Article III jurisdiction was presented in the two cases the Federal Respondents cite for the proposition that the Court "generally" withholds the writ until the lower courts render final judgment on the merits. *See* Fed. Opp. at 5, citing *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327 (1967) and *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916).[2] The certiorari petition in *Brotherhood of Locomotive Firemen* was directed at a

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[1] *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998); *United States v. Williams*, 514 U.S. 527 (1995); *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992); *Gollust v. Mendell*, 501 U.S. 115 (1991); *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990); *Franchise Tax Bd. of California v. Alcan Aluminum Ltd.*, 493 U.S. 331 (1990); *Allen v. Wright*, 468 U.S. 737 (1984); *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*, 458 U.S. 592 (1982); *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982); *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982); *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975); *United States v. Richardson*, 418 U.S. 166 (1974); *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453 (1974).

[2] The two certiorari denials cited by the Private Respondents – the Animal Legal Defense Fund, Mr. Jurnove, and the other individual plaintiffs – for a similar proposition are inapposite. *See* Brief in Opposition to Petition for Writ of Certiorari ("Private Opp.") at 18-19. Neither case involved standing, and each raised a question that the lower courts had not finally resolved. *See Virginia Military Inst. v. United States*, 508 U.S. 946 (1993); *American Construction Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U.S. 372 (1893). *American Construction Co.*, cited by the Private Respondents, and *Hamilton-Brown*, cited by the Federal Respondents, are also of limited relevance insofar as they were decided at a time when a very different statutory scheme, the Judiciary Act of 1891, 26 Stat. 826, governed this Court's certiorari jurisdiction. (The Judiciary Act of 1925, 43 Stat. 936, significantly expanded the scope of that jurisdiction.)

contempt of court issue that the lower courts had not yet finally resolved. *Hamilton Brown* similarly involved an intellectual property dispute that had not been fully resolved in the lower courts. Of equal importance, in the latter case the Court suggested that certiorari had been denied at an earlier stage because of a contention that no question of public interest or importance was presented. 240 U.S. at 257.

The essential point is that the *en banc* decision of the District of Columbia Circuit is that court's final word on the standing issues presented by the Petition. No case cited by any of the respondents involved comparable circumstances. Where, as here, the question presented is a fundamental jurisdictional issue – such as a plaintiff's Article III standing to sue in federal court – review on certiorari is eminently appropriate once the lower court's ruling on standing is final.

2. The Private Respondents argue that Petitioner is guilty of factual misrepresentations, that the decision below is correct, and that Petitioner's right to be in this case is open to question. They are wrong on each point.

a. Petitioner's factual statement was accurate. The Private Respondents wrongly claim that Petitioner "misrepresents that the final regulation at issue requires social grouping." Private Opp. at 5. The regulation, 9 C.F.R. § 3.81, states, as the Petition correctly quotes, that plans of regulated facilities "must include specific provisions to address the social needs of nonhuman primates of species known to exist in social groups in nature," and authorizes only limited exceptions to social grouping. *See* Pet. at 5 & n.1. The Private Respondents, to be sure, reject the *legal* interpretation of the regulation that both Petitioner and the Federal Respondents consider correct, but the existence of that disagreement does not render Petitioner's factual statement inaccurate or misleading.

The Private Respondents also fault Petitioner for not "adequately" describing the extended notice-and-comment rulemaking proceeding that resulted in the regulation at issue here. Private Opp. at 2. They emphasize that the Department of Agriculture "significantly modified its regulatory approach" after

receiving a large number of comments from scientists criticizing the regulation as initially proposed. *Id.* at 4-5. But the fact that the agency published a proposed rule, "gave careful and extensive consideration to the more than 11, 900 public comments received on [its] proposal," 56 Fed. Reg. 6426, 6485 (1991), and promulgated a modified final rule "implement[ing], to the extent possible, performance standards, innovative ideas, and professional judgment for meeting the needs of captive animals," *id.*, is hardly the stuff of revelation. It shows only that the notice-and-comment rulemaking procedure functioned precisely according to its statutory design. The Private Respondents were disappointed with the outcome of that process, but, contrary to their argument, the course of the rulemaking process is not among "the facts pertinent to the Court's consideration of whether *certiorari* should be granted." *See* Private Opp. at 1.

Indeed, any omissions or distortions of "critical facts," Private Opp. at 1, in the papers before this Court are to be found not in the Petition but in the Opposition filed by the Private Respondents. Although the Private Respondents have attached Mr. Jurnove's affidavit to their Opposition, their brief fails to acknowledge numerous facts that go directly to the standing issues presented in the Petition.

Those facts include that: Mr. Jurnove first visited the Long Island Game Farm to investigate the conditions of equines, not to observe primates. Jurnove Aff. ¶ 7, Private Respondents' Appendix ("PR App.") A-3. He returned several times to document violations of United States Department of Agriculture ("USDA") regulations, not to further any purported aesthetic interest in viewing primates. *Id.* ¶¶ 19, 22, PR App. A-7, A-9. The bulk of his affidavit concerns bears, camels, llamas, sheep, rabbits, a cougar, a raccoon, donkeys, and deer. *Id.* ¶¶ 9, 10, 12, 13, 16, 20, 37, PR App. A-4 to A-8, A-14. Mr. Jurnove is able to observe primates and other exotic animals "in various zoos and other parks near [his] . . . home." Jurnove Aff. ¶ 7, PR App. A-3. The majority of upsetting conditions he observed with respect to primates constitute clear violations *not* of 9 C.F.R. § 3.81, but of section 3.75(c)(ii) (sharp objects, *id.* ¶ 8, PR App. A-3), sections 3.78(b) and 3.80(a)(2)(vi) (cold, *id.* ¶ 14, PR App. A-6)

and section 3.75(c)(3) (filth, *id.* ¶ 15, PR App. A-6). His affidavit makes clear that his April 1996 visit to the Game Farm was motivated by his desire to observe "all the improvements that would have been made as a result of USDA's September, 1995 inspection, which I had been responsible for." *Id.* ¶ 33, PR App. A-13.

b. The Private Respondents misapprehend the Court's jurisprudence. In their defense of the decision below, the Private Respondents claim that Petitioner misread or ignored *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and *Sierra Club v. Morton*, 405 U.S. 727 (1972). *See* Private Opp. at 11-12. In fact, the majority decision below cannot be reconciled with those two cases.

As an initial matter, the Court found the plaintiffs in both cases to *lack* standing. 504 U.S. at 578; 405 U.S. at 741. Although the Private Respondents accurately quote the Court's statement in *Defenders of Wildlife* that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing," 504 U.S. at 562-63, they ignore the immediately following passage: "*But the 'injury in fact' test requires more than an injury to a cognizable interest.*" *Id* (emphasis added). An identical statement is found in *Sierra Club*, 405 U.S. at 734-35. The lesson of these two cases, which is very much applicable to the present case, is that constitutional injury-in-fact requires more than an adverse impact on "a desire to . . . observe an animal species."

Contrary to the Private Respondents' contention, Mr. Jurnove does not come within the counter-example set out in *Defenders of Wildlife*. *See* Private Opp. at 13. The *dictum* in question states that a person "who observes or works with a particular animal threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist." 504 U.S. at 566. At most, this statement acknowledges that cognizable injury may be suffered by a plaintiff who complains of a diminution in the overall number of animals in a species that is available for observation or work-related purposes. It is an untenable stretch from that proposition to a

finding that a zoo visitor sustains constitutionally cognizable injury-in-fact by seeking out a distant zoo where he believes he will find animals treated in a way that he finds emotionally distressing. The Private Respondents have not cited a single case that is inconsistent with Petitioner's statement that "no prior decision of this Court or any court of appeals has found a cognizable aesthetic injury-in-fact in the absence of facts demonstrating a tangible threatened reduction in a plaintiff's opportunities to observe specific species of animals or specific environmental phenomena." Pet. at 11.

There is no merit to the Private Respondents' claim that *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), "simply does not apply here" because Mr. Jurnove *observed*, rather than *read about*, the animals whose condition distressed him. *See* Private Opp. at 12. In finding that Americans United lacked standing, the *Valley Forge* Court did not distinguish cases of "visual observation," and indeed specifically wrote that "the psychological consequences presumably produced by *observation* of conduct with which one disagrees . . . is not an injury sufficient to confer standing." 454 U.S. at 485 (emphasis added). Thus, contrary to the Private Respondents' contention, the decision speaks directly to cases, such as this one, that involve "visual observation of the illegal conduct by a person whose aesthetic interests are injured by that conduct." *See* Private Opp. at 12. Not surprisingly, *Valley Forge* is cited in virtually every lower court decision that addresses claims of aesthetic or other abstract injury.[3]

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[3] *See, e.g., State of Utah v. Babbitt*, 137 F.3d 1193 (10th Cir. 1998); *Suhre v. Haywood*, 131 F.3d 1083 (4th Cir. 1997); *Doe v. County of Montgomery, Ill.*, 41 F.3d 1156 (7th Cir. 1994); *Sullivan v. Syracuse Housing Authority*, 962 F.2d 1101 (2d Cir. 1992); *Apache Bend Apartments v. United States*, 964 F.2d 1556 (5th Cir. 1992), *on rehearing*, 987 F.2d 1174 (5th Cir. 1993); *Murray v. City of Austin, Texas*, 947 F.2d 147 (5th Cir. 1991), *cert. denied*, 505 U.S. 1219 (1992); *McKinney v. Dept. of Treasury*, 799 F.2d 1544 (Fed. Cir. 1986); *Donnelly v. Lynch*, 691 F.2d 1029 (1st Cir. 1982), *rev'd on other grounds*, 465 U.S. 668 (1984); *Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986); *Foster v. Center Township of Laporte County*, 798 F.2d 237 (7th Cir. 1986); *O'Hair v. White*, 675 F.2d 680 (5th Cir. 1982) (Tjoflat, J., dissenting); *Flora v. White*, 692 F.2d 53 (8th Cir. 1982); *ACLU v. Rabun County*

The failure of the *en banc* majority even to mention *Valley Forge* stands in stark contrast to the extensive body of standing jurisprudence represented by the cases cited in the margin.

The Private Respondents' efforts to respond on the issues of causation and redressability are no more persuasive. Causation for Article III purposes was neither briefed by the parties nor addressed by the Court in *National Credit Union Administration v. First Nat'l Bank and Trust Co.*, 522 U.S. 479 (1998). *Compare* Private Opp. at 16-17. And *Defenders of Wildlife* explicitly undermines their position on redressability. "Suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations," the Court wrote, are "rarely if ever appropriate for federal court adjudication." 504 U.S. at 568, *quoting Allen v. Wright*, 468 U.S. 737, 759-60 (1984). "The most obvious problem," the Court added, "is redressability" – the only relief available would have been an order to the Secretary of the Interior to redraft the endangered species regulations, but there was no guarantee this would cause the non-parties responsible for the alleged injury to modify their behavior. *Id.* at 568-71. Mr. Jurnove lacks redressability for precisely the same reason.

c. Petitioner is properly in this case. There is no merit to the Private Respondents' suggestion that certiorari should be denied on the ground that Petitioner's status is open to question. Private Opp. at 18. In 1993, Petitioner and Respondent ALDF litigated the exact issue of Petitioner's right to intervene after judgment in the district court for purposes for prosecuting an appeal from a district court decision invalidating 9 C.F.R. § 3.81, the regulation at issue here. The attack on 9 C.F.R. § 3.81 in that case was in every respect identical to the Private Respondents' substantive contentions in this case. *See Animal Legal Defense Fund, Inc. v. Espy*, 29 F.3d 720 (D.C. Cir. 1994). After the district court denied Petitioner's 1993 motion to intervene, the court of appeals unanimously granted Petitioner's motion for summary

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Chamber of Commerce, 678 F.2d 1379 (11th Cir. 1982), *modified*, 698 F.2d 1098 (11th Cir. 1983).

reversal. That decision was firmly rooted in earlier decisions of the District of Columbia Circuit.[4]

The Private Respondents suggest the 1993 case is distinguishable, arguing that in the present case there was "no question that the government [was] going to appeal the ruling, thereby fully protecting NABR's interests." Private Opp. at 18. In fact, however, the government did appeal the 1993 judgment that prompted Petitioner's intervention in that case. Further, the motion to intervene in the present case was filed only after government counsel stated that Petitioner "would be well advised not to look to the Government to represent [Petitioner's] . . . interests and those of its members and that [Petitioner] . . . should speak for itself in this case." Declaration of Michael Socarras (Exhibit B to NABR's Memorandum of Points and Authorities In Support of Motion [to Intervene]), *ALDF v. Glickman*, 943 F. Supp. 44 (D.D.C. 1996) (No. 96-408).

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[4] *See United States v. American Tel. & Tel. Co.*, 642 F.2d 1285 (D.C. Cir. 1980); *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969); *Zuber v. Allen*, 387 F.2d 862 (D.C. Cir. 1967); *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967).

CONCLUSION

The petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia should be granted.

Respectfully submitted,

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